

# For Reference

---

NOT TO BE TAKEN FROM THIS ROOM



# For Reference

NOT TO BE TAKEN FROM THIS ROOM

Ex LIBRIS  
UNIVERSITATIS  
ALBERTAENSIS







Digitized by the Internet Archive  
in 2022 with funding from  
University of Alberta Libraries

<https://archive.org/details/Udokang1970>















12513  
1570  
607

UNIVERSITY OF ALBERTA

THE UNIVERSITY OF ALBERTA

The undersigned certify that they have read, and  
recommended to the Faculty of Graduate Studies for acceptance,  
a thesis entitled SUCCESSION OF NEW STATES TO INTERNATIONAL  
TREATIES submitted by

SUCCESSION OF NEW STATES TO  
INTERNATIONAL TREATIES

by

© OKON UDOKANG

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE  
OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

EDMONTON, ALBERTA

SPRING, 1970





Thesis  
1970  
(607)

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES submitted by Okon Udokang in partial fulfilment of the requirements for the degree of Doctor of Philosophy.





## ABSTRACT

This is a study of the succession of the new States of Asia and Africa to the rights and obligations of their predecessors under international treaties and agreements, and of the effect of independence on the general development of the legal policies of the new States.

The inquiry opens with a survey of the traditional theoretical framework of international law and its evolution, together with a broad examination of the current role of the new States in international law and relations. The effort of the new States, stemming from their criticism of the inadequacies of the existing law, to create new rules of international law is discussed. In this connection, the study notes the gradual shift of emphasis in the role of the General Assembly of the United Nations, under the influence of the new States, from one of a political organ with predominantly advisory and recommendatory functions to that of a "legislative institution with enactive authority". There follows a critical evaluation of the legal status and the overall effectiveness of the allegedly "new" norms of international law thus formulated through the instrumentality of the United Nations. In this process, the dominant political content of the rules is revealed, and this, in turn, throws light on the original substance of the disagreement based on conflicting economic and political interests, between the underdeveloped, new States and the advanced, industrialized





States. This section concludes with the observation that, although the new States have exhibited a reluctance to recognize expressly the binding authority of some of the traditional rules of international law, in their day-to-day operation they not only submit to those rules, but they frequently rely upon them as an effective means of protecting and securing their vital political interests.

The remainder of the investigation focuses specifically on the various aspects of the problem of State succession in international law. Combining analysis of the larger questions of doctrine with an empirical appraisal of the relevant judicial and arbitral decisions, as well as of the prevailing practice of States, the study seeks to discover the essential features characteristic of the attitude of the new States towards succession to international treaties; the kinds of treaties involved; the conditions under which, and with what limitations, the new States are prepared to consider themselves bound by treaty obligations formerly assumed by their predecessors. Furthermore, a close attention is paid to an analysis of the basic factors of international politics which appear to have influenced and conditioned the new States' general conception of contemporary international legal problems.

International law, lacking in a general and definitive rule of subrogation, tends to abandon the applicable principles in a given situation to the subjective interpretation of the States. The inevitable consequence of this is the striking lack of uniformity in the existing international practice re-



lating to the law of State succession. In this context, it becomes doubtful whether current attempts at the formulation of abstract doctrines of universal succession, which are grossly at variance with judicial precedents and the existing practice of States, are likely to be useful as a basis for the development and exposition of concrete rules and principles of State succession which will be at once authentically descriptive of international practice and acceptable to the majority of States.

In conclusion, the study, however, stresses the insufficiency of the traditional approach, and emphasizes, within the context of the present world order, the strong need for clarifying and making more certain many of the prevailing concepts in the law of State succession, so that States may in their practice be guided by more enlightened and reliable principles capable of providing for the mutual adjustments of their interests.





## ACKNOWLEDGEMENTS

I wish to express my sincere indebtedness to Professor L.C. Green, my teacher and supervisor, whose penetrating insight and constructive criticisms have been of immeasurable value. I am also grateful to Dean Gerard V. La Forest of the Faculty of Law of the University of Alberta for his personal interest and helpful suggestions. Dr. W. Hyrak, the Documents Librarian, deserves a special word of gratitude for his tolerant and untiring effort in helping me to track down some of the most elusive documents in the Library. My thanks also go to the members of staff of the Cameron and Law Libraries for their spirit of friendship and willing co-operation. Indeed, it has been said that scholarship is a co-operative enterprise. Last, but not least, the University of Alberta deserves mention not only for its generous support which has made the completion of this dissertation possible, but also for the maintenance and stimulation of an atmosphere conducive to vigorous intellectual activity.





## TABLE OF CONTENTS

	Page
CHAPTER I - INTRODUCTION	1
1. The Role of the New States in International Law and Relations	1
CHAPTER II - THE CONCEPT AND THEORY OF STATE SUCCESSION	106
1. The Concept of State Succession	106
2. The Theories of State Succession	121
3. Contemporary Trends in State Succession Theory	132
4. Conclusion	164
CHAPTER III - SUCCESSION TO TREATIES IN NEW STATES	167
1. Succession in Commonwealth Countries	167
2. Succession by the New Commonwealth Countries	186
3. Succession Under the French System	202
4. General Evaluation and Conclusion	213
CHAPTER IV - SUCCESSION TO MULTILATERAL TREATIES	225
1. Introductory	225
2. Succession to Multilateral Conventions of Which the Secretary-General is Depositary	230
3. Practice of the New States with Regard to Treaties of Which the Secretary-General is Depositary	239
4. Succession to I.L.O. Conventions	244
5. Succession in Respect of the IMF and IBRD	251



	Page
CHAPTER IV - (continued)	
6. Practice of ICAO Respecting Successor States	255
7. Succession to Multilateral Instruments Administered by Other International Organizations	268
CHAPTER V - SUCCESSION TO MEMBERSHIP IN INTERNATIONAL INSTITUTIONS	276
1. Organizations that Provide for Succession to Membership	303
2. Practice of Other Organizations Regarding Succession of New States	305
CHAPTER VI - SUCCESSION TO "LOCALIZED" OR "DIS-POSITIVE" TREATIES	327
1. The Theory of Dispositive Treaties	327
2. Treaties Creating International Servitudes	340
3. Practice of the New States	353
(a) The Franco-American Agreement Respecting American Military Bases in Morocco	353
(b) The Belgian Free Zone in the Ports of Dar-es-Salaam and Kigoma	357
(c) The Nile Waters Agreement (1929)	363
(d) The International Regimes of the Congo and Niger Rivers	367
4. Treaties Fixing Boundaries	377





	Page
CHAPTER VII - SUCCESSION TO BILATERAL TREATIES AND ECONOMIC CONCESSIONS	403
1. General	403
2. Historical Precedents and Succession to Bilateral Treaties	412
3. Practice of the New States and Judicial Decisions	417
4. Succession Relating to Economic Concessions	447
5. Practice of the New States Relating to Economic Concessions	463
CHAPTER VIII - CONCLUSION	479
BIBLIOGRAPHY	509



## ABBREVIATIONS

Annual Digest	Annual Digest of Public International Law Cases
Annuaire francais (A.F.D.I.)	Annuaire francais de Droit International
A.A.L.C.C.	Asian-African Legal Consultative Committee
A.J.I.L.	American Journal of International Law
B.D.I.L.	British Digest of International Law
B.F.S.P.	British Foreign and State Papers
B.T.S.	British Treaty Series
B.Y.I.L.	British Yearbook of International Law
Canadian B. Rev.	Canadian Bar Review
Canadian Y.I.L.	Canadian Yearbook of International Law
Cd., Cmd., Cmnd.	British Command Papers
Columbia L. R.	Columbia Law Review
Cmttee	Committee
Dept. State Bull.	United States Department of State Bulletin
ECOSOC	Economic and Social Council
F.A.O.	Food and Agriculture Organization
G.A.O.R.	General Assembly Official Records
G.A.T.T.	General Agreement on Tariffs and Trade
Hackworth, <u>Digest</u>	Hackworth, G.H., <u>Digest of International Law</u>





Pol. Sci. Q.	Political Science Quarterly
Proc. A.S.I.L.	Proceedings, American Society of International Law
Rep.	Report(s)
Res.	Resolution(s)
R.G.D.I.P.	Revue Generale de Droit International Public
R.I.A.A.	(United Nations) Reports of International Arbitral Awards
R.I.I.A. Docs.	Royal Institute of International Affairs, Documents on International Affairs.
S.C.O.R.	Security Council Official Records
Ser.	Series
Sess.	Session
Suppl.	Supplement
T.I.A.S.	Treaties and Other International Acts Series (United States)
Trans. Grot. Soc.	Transactions of the Grotius Society
Tul. L.R.	Tulane Law Review
U.A.R.	United Arab Republic
U.K.T.S.	United Kingdom Treaty Series
U.N.C.I.O. Docs.	United Nations Conference on International Organization, Documents
U.N. Docs.	United Nations Documents
U.N.E.S.C.O.	United Nations Educational, Scientific and Cultural Organization
U.N.T.S.	United Nations Treaty Series
U.N.Y.B.	United Nations Yearbook



U.P.U.	Universal Postal Union
U.S.T.S.	United States Treaty Series
Whiteman, <u>Digest</u>	Whiteman, M.M., <u>Digest of Inter- national Law</u>
W.H.O.	World Health Organization
World Pol.	World Politics
Yale L.J.	Yale Law Journal
Y.B.W.A.	Yearbook of World Affairs





## CHAPTER I

### INTRODUCTION

#### 1. The Role of the New States in International Law and Relations

International law is an evolving, not a static, institution. Throughout the four centuries of its existence, some of its rules have been amended, modified, adapted or completely discarded, depending on the changing historical circumstances or on the exigencies of the interests of States. During the classical era, the leading writers on international law, such as Vittoria,<sup>1</sup> Suarez,<sup>2</sup> Gentili,<sup>3</sup> Vattel,<sup>4</sup> Pufendorf,<sup>5</sup> and even Grotius,<sup>6</sup> not only

---

<sup>1</sup> F. de Vittoria, Relectiones theologicae (1557); Sir Thomas Eiskine Holland, Studies in International Law (1898) p. 51.

<sup>2</sup> F. Suarez, Tractatus de Legibus ac Deo legislatore (1612); Carnegie, Classics of International Law (Eng. trans by Nutting) (1937).

<sup>3</sup> Gentili, De Jure Belli (1598); Carnegie, Classics of International Law (trans by Rolfe, 1933).

<sup>4</sup> Vattel, Le droit des gens ou principes de la loi naturelle (1758); Classics of International Law (1916) (trans by C.G. Fenwick).

<sup>5</sup> Pufendorf, De jure naturae et Gentium (1672) in Classics of Int. Law (Tran. by C.H. Oldfather and W.A. Oldfather, 1934).

<sup>6</sup> Hugo Grotius, De jure belli ac pacis (1625); Classics of International Law (tran. by F.W. Kelsey, 1925).



emphasized the theological concept of natural law as the divine source of international law, but also tended to view international law as a universal legal system, binding on all nations. Thus, underlying the "classical system" of the law of nations, and giving unity to it, was custom<sup>7</sup> and a common conception of justice and morality.

On the other hand, the positivist writers of the nineteenth and early twentieth centuries, e.g., Wheaton,<sup>8</sup> Lorimer,<sup>9</sup> Phillimore,<sup>10</sup> Westlake,<sup>11</sup> Hall<sup>12</sup> and Oppenheim<sup>13</sup> laid exclusive stress on custom and treaties as expressive of State will in the creation of positive international norms. To the positivists, therefore, international law

---

<sup>7</sup> For discussion of the role of custom in the development of international law, see, e.g., L. Kopelmanas, "Custom as a Means of the Creation of International Law", 18 B.Y.I.L. (1937) p. 127; Josef L. Kunz, "The Nature of Customary International Law" in his The Changing Law of Nations (1968) p. 335; Oppenheim, International Law, Vol. 1 (8th ed., Lauterpacht, 1955) p. 25 et. seq.

<sup>8</sup> Elements of International Law (1836) (8th ed. by Richard H. Dana, 1866), reprinted in Classics of Int. Law (1936).

<sup>9</sup> James Lorimer, The Institutes of the Law of Nations; a Treatise of the Jural Relations of separate Political Communities, 2 Vols. (1883-1884).

<sup>10</sup> Phillimore, Commentaries upon International Law, 4 Vols. (1854-61); (3rd ed., 1879-1889).

<sup>11</sup> Westlake, International Law, 2 Vols. (1904-1907).

<sup>12</sup> Hall, A Treatise on International Law (1880); (8th ed., by Pearce Higgins, 1924).

<sup>13</sup> L. Oppenheim, International Law, A Treatise, 2 Vols. (1905-1906); (8th ed. by Lauterpacht, 1955).





came into existence only through the express or tacit consent of the States. This implied that a State, being the highest form of socio-political organization, could only be subjected to international law through a manifestation of its own free will. Clearly, the development of this theory coincided with the intensification of nationalism and the general tendency to regard the "sovereign State" as the ultimate source of law, and hence the focal point of national loyalty. Another feature characteristic of the positivist doctrine was the increasing emphasis on international law as the law of the "civilized, Christian nations" of Western Europe, or of European origin. Thus international law seemed to be viewed almost exclusively as that body of rules regulating the conduct of "civilized" States in their relations inter se. The use of the term "civilized" indicated the conscious limitation of the applicability of international law to the State or group of States so designated to the exclusion of those which were by definition "uncivilized". And this meant those States outside the ambit of European civilization.<sup>14</sup>

---

<sup>14</sup> Thus Hall wrote: "It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation.... But states outside European civilisation (continued on page 4)



The positivist theory of international law denied, in effect, the assertions of the naturalist writers that international law was part of a universal moral code, and that relations between States were of necessity governed by that law. On the contrary, by limiting the application of international law to the small group of "civilized Christian nations", and holding that "uncivilized nations" had no capacity in international law, they sought to establish that relations between European States and those of non-European civilization could not be based on a footing of legal equality. The very nature of international politics during the nineteenth century, which was dominated by the balance of power system and the constant stress upon the supremacy of the national State,<sup>15</sup> coupled with the scramble of the European States for overseas territories (particularly in Africa and Asia) tended immensely to influence the development and the general character of international law.

It is within this necessarily sketchy frame of reference with regard to the evolution of international law that

---

14 (continued)

must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction". A Treatise on International Law (8th ed., 1924) p. 47.

15 Morton A. Kaplan and deB. Katzenbach, The Political Foundations of International Law (1961) pp. 62-70.





the role of the new Afro-Asian States in contemporary international relations, and their attitude towards existing international law must be examined. This seems necessary, as will be shown, in order to throw some light on the underlying factors - historical, economic, political and even psychological - which appear to have conditioned the views of these States with respect to the specific problem of State succession.

What must be noted, however, is that the difference in emphasis between the naturalists and the positivists as to the source and binding character of international law was largely a function of their specific historical epochs. Changes in emphasis trailed changes in the structure of the international society<sup>16</sup> as well as in social and material conditions of life. With the participation of the Asian States of China, Japan, Turkey, Persia and Siam in the Hague Peace Conference of 1899, and of the Latin American Republics in the second Hague Conference of 1907, the concept of the "family of nations" was to be extended beyond the original group of European States.<sup>17</sup> Clearly, this historical extension of the society of nations from the geographically limited region of Western Europe to other continents, particularly those of non-European

---

<sup>16</sup> W. Friedmann, The Changing Structure of International Law (1964) pp. 5-7.

<sup>17</sup> C.W. Jenks, The Common Law of Mankind (1958) pp. 62-65.



culture, was fraught with important consequences for the development of international law as a universal legal system. International law has remained essentially responsive to new developments and needs within the international society. The institution of the League of Nations in 1919, following the end of the First World War, represented a conscious endeavour to lay a new legal foundation for the organization of international peace and security.<sup>18</sup> Though its structure reflected the influence of the prevailing international forces, in that most of the dependent States of Asia and Africa were not directly represented in it, yet the scope of its objective remained basically universal - the maintenance of a stable international order and the promotion of world peace. The onset of the Second World War coupled with new scientific discoveries and technological invention, as well as the impact of new ideologies, disrupted the old international system, and accentuated the desire to create and maintain a new legal order consistent with the emergent conditions. This desire found expression in the adoption of the United Nations

---

<sup>18</sup> It should be noted that prior to the organization of the League of Nations, various efforts had been made to develop and even codify rules of international law in response to the specific problems posed by new international conditions. Examples are the Peace of Westphalia (1648) ending the Thirty Years War; the Declaration of Paris (1856); St. Petersburg (1868) and London (1909); The Geneva Conventions of 1864 and 1906, and the Hague Peace Conferences of 1899 and 1907.



Charter in 1945 as the constitutional instrument of the new World Organization.

The large-scale emancipation of the former colonial countries of Asia and Africa after the Second World War, and their eventual admission, as independent sovereign States, to membership in the United Nations was to have an even more dramatic impact on the character of the existing international law.<sup>19</sup> Their participation in the United Nations has transformed that world body into a truly universal organization, and affected the whole tenor of international politics. Two relevant points must be noted here. The admission of so large a number of ex-colonial countries to the United Nations on a footing of juridical equality with the older, more advanced countries of the West represented a turning point in the history of the new nations as sovereign international persons. Furthermore, since the United Nations, like other international organizations, operates within the framework of international law, these new States were thus expected to play their part in international life in accordance with

---

<sup>19</sup> Quincy Wright, "The Influence of New Nations of Asia and Africa upon International Law", 13 Foreign Affairs Report (1958) p. 38; Richard A. Falk, "New States and International Legal Order", Hague Recueil (1966, II) p. 10; W. Friedman, "The Changing Dimensions of International Law", 62 Columbia L. Rev. (1962) pp. 1147-49; A. Cohen, "The New Africa and the United Nations", 36 International Affairs (1960) p. 476; L.C. Green, "The Impact of the New States on International Law", 4 Israel Law Rev. (1969) pp. 27-60.





the established rules of international law.

As a system of norms purporting to regulate the conduct of States in their mutual relations, international law has frequently been employed as an instrument of national policy,<sup>20</sup> whether of co-operation or of aggression.<sup>21</sup> Very often, a State's international legal policy, or its approach to the interpretation of a given rule of law affecting a more or less sensitive area of national life, tends to be conditioned by what it deems as its vital interest. Indeed, it has been suggested that international

---

<sup>20</sup> The actual use of international law by foreign affairs departments has varied among different States at different times. Lord McNair has compiled opinions of the Law Officers of the Crown, indicating that the British Foreign Office usually sought legal advice before reaching a decision. Law of Treaties (1961); International Law Opinions, 3 Vols. (1956); see also British Digest of International Law (ed. by Clive Parry). Similarly, the Moore, Hackworth and Whiteman, Digests of International Law show many instances in which the United States and other countries have relied on international law in their conduct of foreign relations. French practice is also shown in Repertoire de la pratique francaise en matiere de droit international public, compiled by A.C. Kiss. See, generally, Brierly, The Outlook for International Law (1944) p. 4 et. seq.; Jessup, The Use of International Law (1959) p. 27 et. seq.

<sup>21</sup> Cf. The Sino-Indian conflict in which each side appeals to existing international law in justification of its policy. In the Vietnam conflict, both N. Vietnam and the United States believe that they are acting in accordance with international law. Disagreement appears to have arisen chiefly as to the interpretation of the facts constituting the conflict. For a critical assessment of the legal positions of both sides, see Richard A. Falk (ed.) The Vietnam War and International Law (New Jersey, 1968).



law is by and large the acceptance by States of policies on the basis of enlightened self-interest.<sup>22</sup> Thus, there is much in the attitude of States towards international law that is relevant to a proper understanding of their practical role in the international society. This, then, provides a further justification for a brief examination in this chapter of the impact of the new States of Asia and Africa on contemporary international law and relations. This, no doubt, is a highly topical subject. In view of the spate of literature in recent years on the attitude of the new States towards traditional international law,<sup>23</sup> it is

---

<sup>22</sup> Myres S. McDougal, "International Law, Power and Policy: A Contemporary Conception", 82 Hague Recueil (1953) p. 137; G.V. La Forest, Proceedings, A.S.I.L. (1966) p. 103.

<sup>23</sup> See, e.g., J. Castaneda, "The Underdeveloped Nations and the Development of International Law", 15 International Organization (1961) p. 38; P.R. Anand, "The Role of the New Asian-African Countries in the Present International Legal Order", 56 A.J.I.L. (1962) p. 383; "Asian-African States and International Law", 15 I.C.L.Q. (1966) p. 55; Ibrahim Shihata, "The Attitude of the New States towards the International Court of Justice", 19 International Organization (1965) p. 203; L.C. Green, "New States, Regionalism and Int. Law". 5 Canadian Ybk. Int. Law (1967) p. 118; "The Impact of the New States on Int. Law", 4 Israel L.R. (1969) p. 27; S. Prakash Sinha, New Nations and the Law of Nations (Leyden, 1967); M. Mushkat, "The African Approach to Some Basic Problems of Modern International Law", 7 Indian J. Int. Law (1967) p. 32; Hazel Fox, "The Settlement of Disputes by Peaceful Means and the Observance of International Law - African Attitudes", 3 International Relations (1968) p. 389; J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law (The Hague, 1961); Oliver J. Lissitzyn, "International Law in a Divided World", 542 International Conciliation (1963) p. 37; see also Asian-African Legal Consultative Committee Reports (2nd sess., Cairo, 1958; 3rd sess., Colombo, 1960; 4th sess., Tokyo, 1961; 5th sess., Rangoon, 1962, all published in New Delhi).





proposed in the present survey to deal only with selected, but relevant, cases which will serve to illustrate and clarify the central theme of this study. As far as practicable, the analysis will draw predominantly upon the actual practice of the new States as evidenced by their official statements on important international law issues, or as determined by the attitude of their representatives in international legal institutions and political bodies.

On a more general level, it may be stated that the basic feature of the attitude of the new Afro-Asian States is its ambivalence towards traditional norms of international law. For while proclaiming their adherence to international law,<sup>24</sup> these States have often, in practice, challenged the validity of certain of its rules, insisting that such rules must be radically changed to reflect changes in the structure of the contemporary international society.<sup>25</sup>

---

<sup>24</sup> See, e.g., the United Nations debates on "principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations". GAOR., 17th sess., 1962, Agenda Item 75, Annexes; 18th sess., 1963, Agenda Item 71, Annexes; U.N. Doc. A/6547 (Dec. 7, 1966); Doc. A/6799 (September 26, 1967).

Notwithstanding its armed attack against "Portugal in Goa, Damao and Dui" in December, 1961, India maintained in a cablegram to the Secretary-General of the U.N. that she has "consistently abided by international law and the Charter of the United Nations". U.N. Yearbook, 1961, p. 129.

<sup>25</sup> Padilla Nervo in I.L.C. Yearbook, Vol. 1 (1957) p. 155; Radhabinod Pal, Ibid., pp. 157-58.



In calling for a review of traditional international law, they have invariably rested their case upon the consensus theory of legal obligation,<sup>26</sup> contending that for any rules of international law to be accepted as universally binding, they must receive the consensus of the great majority of States, including the new States, making up the present international society. On the other hand, the new States have frequently appealed to even the classical principles of international law, where politically expedient, in defence of some specific interests. Thus, the doctrines of national sovereignty and of equality, to cite but two, have had a great attraction for the new States and have been invoked regularly in an effort to safeguard their territory and independence against foreign encroachments.

Boutros-Ghali,<sup>27</sup> writing on the Charter of the Organization of African Unity, laments that Africa's contribution in the areas of international law and relations "has so far been minimal" and states that by the inauguration of the OAU, the African States wished "to make a fresh start, to enact and put into practice a system of law for settling interstate conflicts and regulating relations among African states", since to them

---

<sup>26</sup> J.L. Brierly, The Basis of Obligation in International Law (ed. by H. Lauterpacht and C.H.M. Waldock, 1958) p. 9 et. seq.

<sup>27</sup> "The Addis Ababa Charter", 546 International Conciliation (January, 1964) p. 5.



"classical international law has been merely a projection of colonialism - protectorates, concessions, capitulations - designed in part to legalize European acquisitions and privileges". At the same time he asks: "Must it then be concluded that Africa lacks confidence in international law?" He then draws the conclusion that

An analysis of the principles of the Charter invalidates such a hypothesis. In enunciating the principles of equality and non-interference, the Addis Ababa Charter is inspired by accepted principles of international law. The preparatory work of the May foreign minister's conference also shows the extent to which the representatives of African states insist upon adherence to the most classical form of international law.<sup>28</sup>

Mr. Rakotomalala<sup>29</sup> of Malagasy, speaking in the Sixth Committee of the General Assembly on "Consideration of principles of international law concerning friendly relations and co-operation among States...", affirmed that although "many of the African and Asian countries had not participated in the drafting of the United Nations Charter, ...many of them had made its principles the foundation of their relations with other States". Oliver Lissitzyn sums up the role of the new States in international law in the following terms:

All (the new States) have at various times invoked its norms in disputes with other States and in debates

---

<sup>28</sup> Ibid., p. 31.

<sup>29</sup> GAOR, 20th sess., 6th Cttee., 871st Mtg., p. 188; see also GAOR, 19th sess., Annexes, Annex No. 2.





in international organizations.... (T)hey have participated in diplomatic conferences for the codification and development of international law, and in the work of the Assembly's Sixth Committee. All have entered into numerous treaties, including many general multilateral conventions, thus extending the scope of the application of international law. Several have submitted disputes to the International Court of Justice.<sup>30</sup>

Despite this, Lissitzyn suggests that these States are in fact rejecting traditional international law and its procedures as incompatible with new international conditions and often detrimental to their interests. Castaneda,<sup>31</sup> Anand<sup>32</sup> and Sinha<sup>33</sup> contend that the new States have revolted against traditional international law because it is a product of relations among imperialist States and of relations of an imperial character between imperialist States and colonial peoples. Guha Roy sees it as an instrument of power for the preservation of the spoils.<sup>34</sup> This, in a sense, would appear to give the

---

<sup>30</sup> Lissitzyn, "International Law in a Divided World", 542 International Conciliation (March, 1963) pp. 37-38.

<sup>31</sup> Castaneda, "The Underdeveloped Nations and the Development of Int. Law", 15 International Organization (1961) p. 38.

<sup>32</sup> Anand, "The Role of the New Asian-African Countries in the Present International Legal Order", 56 A.J.I.L. (1962) p. 383.

<sup>33</sup> Sinha, "Perspectives of the Newly Independent States on the Binding Quality of International Law", 14 I.C.L.Q. (1965) p. 121.

<sup>34</sup> S.N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law", 55 A.J.I.L. (1961) p. 866.



impression, quite erroneously and contrary to the exaggerated view of Boutros-Ghali, that the whole corpus of international law has been repudiated by the new States. And yet it cannot be denied that, notwithstanding their frequent reaffirmation of adherence to international law and the principles of the United Nations Charter, the new States have adopted a critical attitude towards certain principles and postulates of the existing law.

Why, then, have the Afro-Asian States taken such conflicting, contradictory attitudes towards established norms of international law? If their contention is that the rules must be changed to take account of changes in the post-war structure of the international society, how have they gone about changing them? What specific rules do they hold to be objectionable and what have they accepted as binding? What is their attitude to the problem of succession to treaties, and how does this affect the general nature of their foreign policies?

An attempt to answer the above questions necessarily leads to an examination of the basis of obligation in international law.<sup>35</sup> International law is a consensual law, for its binding authority is dependent upon the consent of States. This fact was recognized in the Lotus case (1927) when the Permanent Court of International Justice declared

---

<sup>35</sup> Brierly, op. cit., note 26 above.



that

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>36</sup>

The consensual basis of international law also finds expression under Article 38 of the Statute of the International Court of Justice, where "conventions, whether general or particular, establishing rules expressly recognized by the contesting States" is listed as one of the sources of international law. Other provisions of this Article include "international custom as evidence of a general practice accepted as law", and "the general principles of law recognized by civilized nations". But the Court is also empowered to "decide a case ex aequo et bono, if the parties agree thereto".

This notion of consent as the primary basis of the binding force of international law creates a condition whereby a State is able to reserve to itself a wide latitude of freedom with respect to the choice of rules of law by which it agrees to be bound. It is this element of consent - the exercise of the free will of sovereign

---

<sup>36</sup> The Lotus, P.C.I.J., Series A, No. 10, p. 18.







the legitimate norm of international law, or to determine the specific rule to which it is willing to submit. Surely, under such a condition there would be no international law at all, and, in most cases, the strong State would be tempted to enforce its own brand of international justice by means of force and self-help, thereby denying justice to the weak State, and promoting international disorder and chaos in consequence.

Strangely enough, the present international order appears to be marked by the general inclination of States towards the subjective interpretation of international legal rules, even though such interpretation cannot, strictly speaking, be construed as binding on other States. The predominant emphasis upon the doctrine of State sovereignty and the continued insistence of States upon consent as the basis of binding obligation in international law have supported the development of political tendencies that are diametrically opposed to the ends of a stable international society and of a regime of law for the peaceful adjustment of interests between States.

The fact of inequality in the distribution of power and resources and the intensive competition of the great Powers for hegemony would appear, in part, to account for the sensitivity of the new States to the problem of security, whether economic, political or military. This is compounded by the common heritage of their colonial exper-



State<sup>37</sup> to be bound by a given international legal rule - which constitutes the most important single weapon with which the new States have challenged the universality of some of the principles of traditional international law. In its more positive aspects, the requirement of consent, having regard to the decentralized character of the international system, has been the very bone and sinew of the international legal order. With the dominance of the principle of sovereign equality of States<sup>38</sup> and the impossibility of creating supranational institutions with the requisite legislative and executive authority, together with the fact of conflicting national loyalties and standards of values, consent seemed a logical premise upon which the legal force of international law could be founded. Yet, it is clear that this has also been the fundamental source of its weakness. The concept of consent in modern international law, if pressed, is bound to lead to reductio ad absurdum. For each State would arrogate to itself the exclusive right and power to interpret and apply what it considers to be

---

<sup>37</sup> This Hegelian concept of the State as a kind of mystic entity was reformulated and developed into the legal doctrine of "autolimitation" by Jellinek, and has remained a principle with considerable appeal for every State. See W. Friedmann, Legal Theory (1967) p. 575.

<sup>38</sup> This principle is expressly recognized under Article 2 (1) of the U.N. Charter. It was also implicit in Article 5(1) of the Covenant of the League of Nations (1920).



ience. Nearly all of the new States are ex-colonial territories. They are marked by economic, cultural and technological underdevelopment. Militarily, they remain weak vis-a-vis the great Powers. Given these facts of military weakness, unstable political conditions and the status of economic helotry in a society of States dominated by the wealthy and powerful, it is hardly surprising that they have exhibited a temper of suspicion towards traditional international law. They tend to see in some of the old rules a system of law which created and justified relations of inequality between themselves and the colonial powers of Europe. The so-called "revolt" of the new States against traditional international law is in essence the problem of conflict of interests<sup>39</sup> between a group of politically weak and economically backward States, and a group of highly developed and powerful States. It is in an effort to adjust these interests that the new States have become critical of some of the rules that they regard as not affording them the required protection, and have sought by means of their participation in international institutions to alter the content of such legal rules.

It is against this background that the new States' preoccupation with such concepts as "national sovereignty", "self-determination", "human rights", "social justice",

---

<sup>39</sup> Rosalyn Higgins, Conflict of Interests (1965) p. 49 et. seq.





"sovereign equality" and "non-intervention" can best be appreciated. Thus, the representative of Madagascar declared in the Sixth Committee of the General Assembly, in 1962 that "...African countries like Madagascar, which had only recently become independent, attached particularly great importance to respect for the national sovereignty, territorial integrity and independence of States, to their sovereign equality and to non-intervention in their domestic affairs".<sup>40</sup> The Ceylonese delegation believed that "a new international law had emerged, and its purpose was to bring about... international social justice".<sup>41</sup> Mr. Pal of India, speaking at a meeting of the International Law Commission, expressed the conviction that "there could be no doubt that an international public order existed now and that certain principles of international law had the character of jus cogens". "The whole perspective of the United Nations policy", he continued, "could be characterized as a value-orientated jurisprudence, directed towards the emergence of a public order in the international community.... The Charter sought to establish a process by which the world community could regulate the international abuse of naked force and promote a world public order

---

<sup>40</sup> GAOR., 17th sess., 6th Cttee., 765th mtg., para. 13.

<sup>41</sup> GAOR., 18th sess., 6th Cttee., 805th mtg., para. 16.



embodying values of human dignity in a society dedicated to freedom and justice".<sup>42</sup> As to the question of non-intervention, the Philipino representative observed that not only is there a duty upon States not to intervene in matters within the domestic jurisdiction of another State, but that international law recognizes it "as an attribute of independence and sovereignty that a State should be free from intervention by other States".<sup>43</sup> But, as will be shown later, the new States themselves do not appear always to live up to this principle. The anxiety of weak States about possible intervention by a more powerful State is demonstrated by the attitude of the young Latin American States at the Hague Peace Conference of 1907. At the San Francisco Conference, the Brazilian delegation had proposed that the prohibition on the use of force by States under Article 2(4) be extended to include economic force or political pressure, but this was rejected.<sup>44</sup>

It would appear, therefore, that the new States' instinctive appeals to the rigid doctrine of national sovereignty and territorial integrity as well as to the natural law principle of justice as an "objective rule" of

---

<sup>42</sup> I.L.C. Yearbook, Vol. 1 (1963) p. 65 (Italics added).

<sup>43</sup> GAOR., 18th sess., 6th cttee., 823rd mtg., para. 7.

<sup>44</sup> United Nations Conference on International Organization, Commission I, June 5, 1945, Vol. 6, pp. 334-335.



international law are further inspired by deep-seated economic and political motives. Implicit in the concept of sovereignty is the traditional legal doctrine of salus populi suprema lex,<sup>45</sup> generally viewed as indispensable to the very welfare and national security of a State. Having just emerged from colonial rule, the new States seek anew to emphasize the nature of the State as a supreme political institution, sovereign within its territorial limits. The theory of the supremacy of the sovereign State over its domestic jurisdiction would appear to fulfil for the new States a dual purpose. First, it would guarantee liberty of political and economic action made necessary by the overriding purpose of public policy, without the danger of foreign intervention. Second, it would enable them to stress the consensual basis of binding international engagements, thereby enabling them to reject those postulates of international law, the formulation of which they claim did not receive their consent.

The first would further permit them to take nationalization or expropriating measures under what they may define as exceptional circumstances, even if that might mean infringement of the private rights of nationals or of aliens. They might, in the second case, find it expedient, in the event of a refusal to comply with a given inter-

---

<sup>45</sup> Bin Cheng, General Principles of Law (1953) pp. 30-31.





national legal norm, to plead, in defence of their position, the irresistible necessity of "national self-preservation" as a supervening condition for non-observance.

At this stage it is necessary that we examine in detail the attitude and practice of the new States so as to understand the extent to which they have rejected, or conformed to, the principles of existing international law. In this connection, it will be useful, first, to review the attitude of the Latin American States towards traditional international law, not because they are chronologically speaking, new, but because they share with the Afro-Asian States a more or less common historical experience, common characteristics of economic underdevelopment and unstable political institutions. Furthermore, they have, since their emancipation in the 19th century, exercised some influence on the development of international law. Their political and economic interests as underprivileged States have led to the development and advocacy of new legal doctrines, albeit of regional application, embodying "principles, conventions, practices and institutions" peculiar to that region. There is little doubt that the Latin American approach to international law has, to a large extent, inspired the current views and performance of the newly independent States of Asia and Africa.

The "rebellion" of the Latin American States against



certain postulates of traditional international law, and their insistence upon new rules with a high political content derive partly from their history and partly from endemic local factors.

As early as 1868, Calvo, the Argentine jurist, formulated what has come to be called the "Calvo Clause" in an attempt to exclude the liability of a State under international law in respect of contracts entered into with alien private interests. Under this clause, the alien private contractor could only seek remedy, in case of expropriation, under the domestic law of the contracting State. This doctrine had arisen as a result of the intervention of France and Great Britain in Argentina, Uruguay and Mexico with a view to protecting their national creditors. Its basic object was to ensure the politically weak Latin American Republics against the military or political intervention of the European powers.<sup>46</sup> On the other hand, the Drago doctrine, first enunciated by the Argentine Foreign Minister in 1902, sought to eliminate the use of armed force by one State against another where the latter had defaulted in its public debt. It is significant that the Hague Conference of 1907, under the pressure of the Latin American participants, prohibited the resort to armed

---

<sup>46</sup> D.R. Shea, The Calvo Clause (1955) pp. 17-20, 216-17; see also A.V. Freeman, "Recent Aspects of the Calvo Doctrine and the Challenge to International Law", 40 A.J.I.L. (1946) p. 121.



force by a State in order to recover debts due to its nationals by another State, unless the defaulting State refused to accept arbitration or submit to an arbitral award. The provision of Article 2(4) of the U.N. Charter enjoining States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State" would seem in effect to confirm or supplement the Drago doctrine.<sup>47</sup> However, there appears to be a resurgence of interest in the doctrine of non-intervention on the part of the new Afro-Asian States in view of the problem of State responsibility relating to the succession of these States to the debts of their predecessors.

The Latin American Republics have tended to regard non-intervention as an objective principle of the "new international law". Thus, they championed the incorporation of the illegality of intervention in the Bogota Convention of April 30, 1948, in order to give it the force of conventional law, at least of a regional application. Article 15 of that Convention defines intervention as "any form of interference or attempted threat against the personality of the State, or against its political,

---

<sup>47</sup> P.C. Jessup, A Modern Law of Nations (1968) p. 114.





economic and cultural elements".<sup>48</sup> The exaggerated concern of the new States with non-intervention illustrates the degree to which their position as militarily weak States, or as capital-importers, demands protection against the possible interventionist policy of the capital-exporting States. This appears also to suggest the value implicitly attached to the doctrine of absolute sovereignty, for insistence upon almost unconditional State sovereignty and territorial integrity is no more than a defensive posture by a weak State which fears the pressure of the more powerful ones. As A.J. Thomas has aptly observed, the intense preoccupation of the Latin American States with the interventionist policy of the great Powers led them to insist on the illegality of intervention as a rule of international law.<sup>49</sup>

Traditionally, intervention implies a violation of one State's independence or territorial integrity by another. This, in principle, is impermissible under international law, except under conditions of overwhelming necessity,

---

<sup>48</sup> Pan-American Union, Law and Treaty Series, No. 73, p. 27; 46 A.J.I.L. (1952), Supplement, p. 43. It is of interest to note that the United States refused to endorse this definition of intervention.

<sup>49</sup> Thomas, "Non-Intervention in Public Order in the Americas", Proceedings, A.S.I.L. (1959) p. 72; A. vanW. Thomas and A.J. Thomas, Non-intervention: The Law and its Import in the Americas (1956) pp. 55-64; C.G. Fenwick, The Organization of American States: The Inter-American Regional System (1963) pp. 549-551.



such as self-defence, protection of nationals abroad,<sup>50</sup> or reprisals.<sup>51</sup> Looking back to the early days of their independence, and indeed extending to the early part of this century, when frequent interventions by the European and North American States were undertaken for the ostensible reason of "protecting their nationals abroad", the Latin and Central American States' immediate reaction has been to appeal to the classical doctrine of sovereignty as a defensive mechanism. To them, it is not possible to confine the definition of intervention merely to peremptory, military action;<sup>52</sup> intervention could take different forms and was apt to affect a broad spectrum of national life. The inscription into the Bogota Convention, therefore, of a prohibition against interference in "the political, economic and cultural" life of a State must be interpreted as a passionate effort on the part of a weak, newly established State to proscribe force as an instrument of foreign policy, despite the traditional notion of sanction or coercion as an intrinsic quality of State power.

---

<sup>50</sup> See Richard A. Falk, "Historical Tendencies, Modernizing and Revolutionary Nations and the International Legal Order", 8 Howard L.J. (1962) p. 128.

<sup>51</sup> Brierly, The Law of Nations (6th ed., Waldock, 1963) p. 402.

<sup>52</sup> For a treatment of the various definitions of intervention, see Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations (1963) p. 68.



A further consequence of their vulnerable political position has been the strong need felt by the new States for freedom of action and for the protection of their economic interests. This has led to the assertion by many of the Latin American States of sovereignty over a two-hundred mile territorial sea, a claim which the Geneva Conference on the Law of the Sea held in 1958 refused to endorse. On the contrary, the twelve-mile limit appears to have been conceded by most States.<sup>53</sup> Convinced, however, that regional international law consists of a body of rules growing out of the national needs of the specific group of States, and intended to govern the conduct of such States within their geographic sphere, they contend that such rules of regional law are also capable of governing the conduct even of States outside their zone of operation. Thus, the Peruvian Foreign Minister was to declare in 1954 that "the world must accept the fact that America is elaborating its own code of rights based on its social needs which are at variance with the freedom of the seas".<sup>54</sup>

The law of political asylum has its distinctively Latin American character, and is often invoked as a regional

---

<sup>53</sup> Convention on the Territorial Sea, Article 24(2); 52 A.J.I.L. (1958) p. 840; Green, "The Impact of the New States on International Law", 4 Israel L. Review (1969) p. 37.

<sup>54</sup> The Times, London, 4 December, 1954, cited by Green, Ibid.





customary law. In the Asylum case, Colombia relied on the existence of American international law based upon custom as a defence concerning the granting of diplomatic asylum to a Peruvian refugee. However, the Court ruled that the burden of proof lay upon Colombia as to the existence of such a regional custom. It stated:

The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.<sup>55</sup>

Thus Colombia's action was held by the Court as not in conformity with the 1928 Havana Convention on asylum, in force between Colombia and Peru.<sup>56</sup> Nevertheless, Judge Alvarez, in his dissenting opinion, maintained that "a principle, custom, doctrine... need not be accepted by all of the States of the New World in order to be considered as a part of American international law.... American international law is binding upon all the States of the New World; it is also binding upon the States of other continents in matters affecting America..."<sup>57</sup>

---

<sup>55</sup> I.C.J. Reports, 1950, p. 266 at p. 276.

<sup>56</sup> Ibid., p. 288. See H. Briggs, "The Colombian-Peruvian Asylum Case and Proof of Customary International Law", 45 A.J.I.L. (1951) p. 728.

<sup>57</sup> I.C.J. Reports, 1950, p. 294.



A regional law such as the Latin American law of diplomatic asylum is to all intents and purposes an outgrowth of endemic political conditions. The chequered history of Latin American States, plagued by constant coups d'etat, civil wars and frequent changes of governments, has created the need to provide protection for political refugees. It has further led to the anxiety of these States to transform the notion of political asylum into an objective legal right subject to no reciprocity. When the Pan-American Conference of 1933 adopted a Convention on Political Asylum, it provided that this protection was available to anyone irrespective of his nationality. Yet the United States whose interest remained unaffected by the problem of political asylum, in signing the Convention, made reservation to the asylum provisions.<sup>58</sup>

There are major divergencies of policy as to the practical interpretation of the doctrine of political asylum even within Latin America itself. Notwithstanding the theoretical assumption that this is an objective norm of regional international law, each State's approach to the problem appears to be determined by its specific situation at a specific time. In the case just cited, Colombia claimed the right to determine unilaterally the qualification of the refugee for political asylum. On the contrary,

---

<sup>58</sup> Hackworth, Digest of Int. Law, Vol. 2, p. 648.



Peru, whose interest was directly affected, rejected the Colombian claim and demanded the return of the alleged refugee. However, we are here not concerned with whatever differences in attitudes there may exist between the Latin American States themselves, nor with whether such principles as they have advocated have won universal recognition. What is of immediate relevance is the actual impact of these States on international law through the development of international legal doctrines of a peculiar, even novel, character, reflecting the peculiarities of their interests and national aspirations.

In so far as the new States of Asia and Africa are concerned, their efforts to change certain rules of general international law, just like their Latin American counterparts, have centred on the use of appropriate international institutions. They have in general tended to treat the United Nations, for instance, as a supranational legislative machinery for creating new international norms.<sup>59</sup> It may be suggested that the effect of their membership in international organizations is as much psychological as it is political. This is demonstrated by their frequent references to those provisions of the U.N. Charter which talk of the sovereign equality of all States.<sup>60</sup> It is to be

---

<sup>59</sup> Anand, "The Role of the New Asian-African Countries in the Present International Legal Order", 56 A.J.I.L. (1962) p. 390.

<sup>60</sup> E.g., Art. 2(1), also Art. 1(2).





noted, however, that the view is still inadmissible even in the international organizations themselves that such organizations are in any way supranational legislative institutions. Nevertheless, in view of their numerical strength in the United Nations, they have found the organization the most attractive means by which the "enactment of a new international legal order" could be brought about. As indicated earlier, prior to 1945, the vast majority of the Afro-Asian States were still subject nations. Their rise after the war from colonial bondage to sovereign independence and their active participation in contemporary international life have provided them with a rationale, however inadequate, for attempting to change those rules of law which they claim do not reflect the factual changes in the international situation.

Radhabinod Pal<sup>61</sup> of India, and a member of the Inter-

---

<sup>61</sup> Pal, "Future Role of the International Law Commission in the Changing World", 9 United Nations Review (1962) p. 31.

With regard to the argument of the new States that their accession to the international community ipso facto creates a new international society and necessitates a transformation of the international legal system, Professor C.F. Amerasinghe of Ceylon, in his State Responsibility for Injuries to Aliens (1967) p. 26, has contended that the addition of new members to the international community could not imply a revolution in the legal order; "...the legal order survives in the same way when one or two members are added to the old community. The materialization of a sufficiently large number of such new individuals in a community within a short period of time cannot have the effect of bringing about a revolution in the legal order of customary law in regard to the new entrants to the community".



national Law Commission of the United Nations, has argued that "it could hardly be denied that the activities of the United Nations in the field of international law had failed to keep pace with the needs of a swiftly moving world". He therefore believes that "the progressive development of international law would bring about a greater degree of universality through the contributions and the active participation of the many new nations which had emerged on the international scene". Accordingly, the basic question so far as the new States are concerned is "to what extent they ought to be bound by rules of international law which they had not helped to create and which very often ran counter to their interests". Similar sentiments had earlier been expressed in the International Law Commission debate on State responsibility by the Mexican delegate.<sup>62</sup> He maintained that "the vast majority of new States had taken no part in the creation of many institutions of international law which were consolidated and systematized in the nineteenth century.... With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States". Inequality of strength, he argued, was reflected in an inequality of

---

<sup>62</sup> Padilla Nervo, in I.L.C. Yearbook, Vol. 1 (1957) p. 155.



rights, with the result that the basic principle of international law, par in parem non habet imperium, was completely disregarded. Of particular interest here is the readiness of the new States to invoke the traditional principle of equality of States, expressed in the doctrine par in parem non habet imperium. The significance attached by these States to the problem of inequality and to the principle of justice (which lex ferenda entails) must not be underrated if one is to grasp the crucial factors at the root of their behaviour. This will be dealt with in greater detail when we come to examine the manner in which they have employed these principles in the attempt to formulate new norms of international law.

As regards the presence of the new States in the United Nations General Assembly, where they form the majority, there is a marked tendency for them to take advantage of their numbers by adopting resolutions, some of which are of a declaratory nature, which they regard as possessing the force of law, and hence binding on all States. Article 24, paragraph 1 confers upon the Security Council the "primary responsibility for the maintenance of international peace and security", and under the terms of Article 25, "the members of the United Nations agree to accept and carry out the decisions of the Security Council". Article 10 of the Charter merely confers upon the General Assembly the competence to "discuss any questions or any





matters within the scope of the present Charter". Subject to the provisions of Article 12, the General Assembly may also "make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters". These provisions of the Charter show that the Charter invested the Security Council with exclusive executive competence while the powers of the General Assembly were essentially recommendatory. But since 1950, new international developments have affected the effective operation of the Security Council as the executive organ of that world body, and brought about a shift of competence between the Security Council and the General Assembly.

The "Uniting for Peace"<sup>63</sup> resolution of November 3, 1950, had made it possible for the General Assembly to assume in practical terms the function of providing for the maintenance of peace and security, since the Security Council, through lack of unanimity of the Permanent Members, was rendered unable to fulfil its function. Thus,

---

<sup>63</sup> GAOR, 5th Sess., Suppl. 20, Res. 377(V).

It should be noted that, whatever the position of the Security Council may be, the effectiveness of such resolutions depends, in the final analysis, upon the acquiescence of the Great Powers. This resolution was adopted under the leadership of the United States after the Soviet Union had committed the tactical error of absenting itself from the Security Council Meeting on the grounds that the People's Republic of China was not seated on the Council.



factors of the cold war, as well as the increased number of the new States in the Assembly have made it possible for the General Assembly to assume greater "executive authority" than was envisaged by the Charter itself. The General Assembly has often referred to the "purposes" laid down in Article 1 and the "principles" enunciated in Article 2 as providing the constitutional grounds<sup>64</sup> for its decisions. But it does not seem possible to infer specific legal obligations merely from the statement of purposes (e.g., Article 1) contained in the instruments of international organizations.

Article 13 paragraph 1(a) empowers the General Assembly to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification". Pursuant to this authority, the International Law Commission was established in 1948 by the General Assembly as its subsidiary legal organ. At that time the Commission had a membership of 15, but this has now been increased to 25 with the underdeveloped States holding not less than 10 of the seats on the Commission. By the Resolution of December 11, 1946, the General Assembly acting under the mandate of Article 13,

---

<sup>64</sup> Leland M. Goodrich in an interesting article has pointed out that one of the distinctive developments within the United Nations has been the common practice of interpreting the Charter as a constitution rather than as a treaty. "The Political Role of the Secretary General", 16 International Organization (1962) p. 726.



had confirmed the Nuremberg Principles as constituting part of general international law, in spite of the fact that the new States had taken no part in the creation of that law. Other new States on joining the United Nations have inherited this law and have so far not repudiated it as one which was created without their consent.

Membership of the new States in the General Assembly as well as their participation in the International Law Commission, has fostered the belief that, through their influence over the content of resolutions, they are not only helping to mould and shape a new system of international order, but also laying the foundation for a "millennium" in which international justice and equity will be the guiding principle of inter-State relations. A case in point is the Indian representative's statement in the debate on the law of treaties in 1963. He saw in the present system the existence of "a world public order embodying values of human dignity in a society dedicated to freedom and justice".<sup>65</sup> The present attitude of the new States towards

---

<sup>65</sup> I.L.C. Yearbook, Vol. 1 (1963) p. 65.

Judge Pal's speech reveals again both the basic fears and aspirations of the new States. On the one hand, they tend to repose implicit faith in the world organization as the replica of a genuine constitutional government. The welfare State concept which imposes upon the municipal government a moral obligation to provide for the social and economic advancement of the individual is transformed into a duty incumbent upon a "world government" operating (continued on page 37).





the United Nations and their conception of its role as a law-creating agency are manifested in their acceptance of a large number of resolutions, including those on "Permanent Sovereignty over Natural Wealth and Resources",<sup>66</sup> "Declaration on the Granting of Independence to Colonial Countries and Peoples",<sup>67</sup> "Prohibition of the Use of Nuclear Weapons",<sup>68</sup> and the Universal Declaration of Human Rights,<sup>69</sup> as legally binding upon States, regardless of the practical problem of enforcement. In 1961, during the debate on the

---

65 (continued)

on a supranational level. Furthermore, the speech reveals the new States' idealist conception of a world order committed to the promotion of justice. Mr. Yasseen of Iraq, a member of the I.L.C., announced in the same debate that he was only able to accept Professor Vedross's definition of "a general principle of law" since it stipulated that "a principle must be directly derived from the concept of justice and accepted by nearly all civilized nations or the great majority of them". (I.L.C. Yearbook, Vol. 1, 1963, p. 42). Members of the Communist bloc of nations in their U.N. debates have frequently asserted that "justice" as well as "peaceful coexistence" and "equality" are qualitatively new principles of international law. See, for instance the Czechoslovak delegate's speech during the debate in the 6th Committee on "coexistence" (GAOR, 17th Sess., 6th Comtee., 753rd Meeting, (1962) pp. 96-97). On the problem of defining the legal content of equality, see D.P. O'Connell, International Law, Vol. 1 (1965) pp. 346-47; See also Cheng, "Justice and Equity in Int. Law", 8 Current Legal Problems (1965) p. 185.

<sup>66</sup> G.A. Res. 1803 (XVII), 14 December, 1962.

<sup>67</sup> G.A. Res. 1514 (XV), 14 December, 1960.

<sup>68</sup> G.A. Res. 1653 (XVI), 24 December, 1961.

<sup>69</sup> U.N. Doc. A811; Res. 217 A(111).



law of treaties, the Ceylonese delegate emphatically stated that "multilateral treaties were the best source of international law, and all the United Nations resolutions could be regarded as such".<sup>70</sup>

The Universal Declaration of Human Rights was adopted by the General Assembly as early as December, 1948. At that time only a few of the new Afro-Asian States were members of the world organization. But with the granting of independence to most of the African countries in the 1960's, the number of the new States in the United Nations has greatly increased. Influenced by their recent experiences as colonial peoples, these new nations have come to look upon this particular declaration as a supreme example of general international law. Little regard is paid to the fact that traditionally, the treatment of nationals is a matter within the exclusive jurisdiction of a State.<sup>71</sup> And quite often, Member States have invoked Article 2(7) of the U.N. Charter as a means of excluding international action from an area regarded as falling exclusively within their domestic jurisdiction.

Associated with this are a substantial number of other declaratory resolutions of the Assembly, particularly those bearing on the values of human dignity, economic security

---

<sup>70</sup> GAOR., 16th sess., 6th Cmttee., 716th Mtg.

<sup>71</sup> Green, "General Principles of Law and Human Rights", 8 Current Legal Problems (1955) p. 162.



and political independence. By regarding these declarations as new universal principles imposing a positive duty on all States, the General Assembly, under the pressure of the new States, has gradually and less surreptitiously abandoned its advisory and recommendatory function, transforming itself in the process into a "law-making organ" of the international community. The Charter itself is silent on the exact nature and content of human rights. Any attempt to define the legal content of human rights<sup>72</sup> would probably not receive the consensus of all States. Since there are enormous differences in national standards and values, national interpretation and application of this principle would vary widely. It would appear that, to a large extent, each country's

---

<sup>72</sup> With regard to the legal character of the Universal Declaration of Human Rights, Brownlie states: "The Declaration is not a legal instrument, and some of its provisions, for example the reference to a right of asylum, could hardly be said to represent legal rules. On the other hand, some of its provisions either constitute general principles of law or represent elementary considerations of humanity". (Principles of Public Int. Law, 1966, p. 463); O'Connell holds that: "As a legal document, the Universal Declaration is of doubtful significance. Even its architects appear to have regarded it as no more than a statement of principles in the political realm, or at best enjoying no more legal authority than any other recommendation of the General Assembly" (International Law, Vol. II (1965) p. 821). On the other hand, Dr. Higgins agrees with Lauterpacht that "the human-rights provisions (of the Charter) are not merely declaratory, but carry with them a legal obligation. Moreover, the legal obligation would remain even if the Charter indicated no means for its implementation". (The Dev. of Int. Law Through the Pol. Organs of the U. Nations, 1963, p. 119).





attitude to the Declaration of Human Rights is determined by its existing domestic policy, or the nature of its political and economic organization. Even if it were possible to enforce this Declaration, great difficulties would still be encountered in some States. What would be for some a confirmation of an existing domestic policy would mean for others intervention in their domestic affairs. Neither South Africa with its open policy of apartheid, the Soviet Union with a socialist organization of economy, nor the United States with the "free enterprise" system are likely to have the same conception or interpretation of human rights, even though some of these States voted for the human rights covenants. Thus, while it may be possible to achieve a consensus on abstract rights, it is only when such is explicitly embodied in a treaty with machinery for protection that it can be said to be legally significant.

As to the legal effect of General Assembly resolutions in general, opinion of authorities is divided. Strictly speaking, having regard to the competence of the General Assembly under the Charter (Art. 10), it would appear that, except in so far as the budget and elections are concerned, the Assembly is not authorized to take decisions of an obligatory character. It is empowered to discuss matters falling within the scope of the Charter, subject only to Article 12, and to make "recommendations" regarding such matters to the Security Council. On the contrary, under



the terms of Article 25 the General Assembly is bound by the decisions of the Security Council. Yet in some of the most recent literature, certain authorities have argued that, depending on the nature of the resolution and the legal competence of the Assembly with respect to the subject-matter, certain resolutions have undoubted legal force. Such resolutions are therefore held to be "law-making",<sup>73</sup> especially if they are declaratory of existing principles of general international law. In this connection Dr. Brownlie asserts:<sup>74</sup>

In general these resolutions are not binding on member States, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.

Rosalyn Higgins maintains that "resolutions of the Assembly are not per se binding: though those rules of general international law which they may embody are binding on member States, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence. Those resolutions of the Assembly which deliberately - rather than incidentally - provide declarations

---

<sup>73</sup> Brownlie, op. cit., p. 11.

<sup>74</sup> Ibid.; D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", 32 B.Y.I.L. (1955-56) p. 97.



on international law are invariably based on other quasi-judicial forms of support".<sup>75</sup>

These statements must only be read within the context of the provisos contained therein. If "rules of general international law" are binding independently of the resolution of the Assembly, any argument regarding the binding nature of the Assembly resolutions would, therefore, appear to be irrelevant. While it is possible to accept the contention that resolutions of the Assembly which are declaratory of existing rules of international law are in themselves binding, the question as to the legal effect of those Assembly resolutions which are not declaratory of existing international law still remains unanswered. The reasoning that only "those rules of general international law" embodied in such resolutions may be regarded as binding on member States, would seem to imply that those rules which are not of general international law, but which are still part of such resolutions, are not binding on member States. It is submitted that this type of argument merely begs the question. The question is whether or not General Assembly resolutions possess any legal obligation. It is here con-

---

<sup>75</sup> Higgins, op. cit., p. 5; see also Richard A. Falk, "On the Quasi-Legislative Competence of the Gen. Assembly", 60 A.J.I.L. (1966) p. 782 et. seq.; Sloan, "The Binding Force of a 'Recommendation' of the Gen. Assembly of the U.N.", 25 B.Y.I.L. (1948) p. 1; Asamoah, The Legal Significance of the Declarations of the Gen. Assembly of the United Nations (1966) pt. IV.





tended that a proper answer to that question is to be found by reference to the specified competence conferred upon the General Assembly by the Charter. There is little doubt as to the moral desirability of creating a peaceful international society based on "justice" and the rule of law. But it would be a curious idealism indeed which ignored the stark realities of international life itself. Neither vague assertions of the "legislative competence"<sup>76</sup> of the General Assembly, nor adoption by it of resolutions purported to possess the force of law but without any effective executive machinery, is likely to help the cause of the United Nations in a substantial and tangible way. On the contrary, it is possible to argue that the passage of resolutions which are likely to remain, and some of which have remained, a dead letter<sup>77</sup> may well hinder its progress and impair its stature.

---

<sup>76</sup> See, e.g., Goodrich, op. cit., note 64 above; Falk, loc. cit., n. 75 above; Sloan, loc. cit.; Friedmann, The Changing Structure of International Law (1964) pp. 135, 140; Oscar Schachter as cited by Rosalyn Higgins, op. cit., p. 5, note 13. See also Samuel A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions", 63 A.J.I.L. (1969) p. 444.

<sup>77</sup> Cf. G.A. Res. 2145 (XXI) of October 27, 1966, terminating South Africa's mandate in South West Africa and "reverting the administration of the territory to the United Nations"; the whole series of resolutions on Southern Rhodesia, particularly Res. 2022 (XX) of November 5, 1965 and Res. 2151 (XXI) of November 17, 1966 calling upon the Government of the United Kingdom to employ force "to put an end to the illegal racist minority regime in Southern Rhodesia and to ensure the immediate application of General Assembly Resolution 1514 (XV)" of December 14, 1960, on the granting of independence to colonial countries and peoples.



Clearly, it is not unlikely that the new States may have been inspired by the theory that General Assembly resolutions are "law-making" to overlook the obvious and very real limitations upon the legislative role of the United Nations in the present world society. Thus, in 1962, a Ceylonese delegate,<sup>78</sup> speaking in the Sixth (Legal) Committee of the General Assembly, was to argue that "the question was whether the United Nations could make new laws or merely record existing international customary law". Basing his claim upon the powers of the General Assembly under Article 10, he asserted that "General Assembly resolutions of a declaratory nature, giving fresh vitality to the Charter, were a source of international law".

It is of interest to note that the World Court, itself the judicial organ of the United Nations, has, in some of its advisory opinions, sustained and fostered this evident feeling on the part of the new States by regarding declarations of the General Assembly as possessing great legal

---

<sup>78</sup> GAOR., 17th sess., 6th Cmttee., 763rd Mtg., p. 150; see also G. Tunkin, "Co-existence and International Law", 95 Hague Recueil (1958) p. 1.

Earlier, the Australian delegate had argued that the adoption of resolutions by the General Assembly was not a method of making international law since that did not correspond to the conventional processes by which a rule in international law can acquire obligatory force; furthermore, the powers of the Assembly were delimited by Article 13(1). GAOR., 17th sess., 6th Cmttee., 758th Mtg., p. 120.



value. An example is the case of Certain Expenses of the United Nations (1962).<sup>79</sup> While such opinions are given with appropriate qualifications, their general effect seems to be that certain member States of the United Nations, without taking into account the definite limitations of the General Assembly as a political forum, or its powers as an advisory body, or indeed the fact that "the international system (still) has no central organ for the enforcement of international legal rights",<sup>80</sup> are tempted to treat the potpourri of General Assembly resolutions, some of which are not only politically unacceptable to other States, but legally unenforceable by the United Nations, as imposing a legal duty upon all States. In his separate opinion on the South West Africa Voting Procedure (1955), Judge Lauterpacht, with his characteristic internationalist flair, declared:

It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce

---

<sup>79</sup> I.C.J. Reports, 1962, p. 157.

<sup>80</sup> J.L. Brierly, The Law of Nations (6th ed., Waldock, 1963) p. 101, makes the relevant observation that "this absence of (a supranational) executive power means that each State remains free... to take such action as it thinks fit to enforce its own rights. This does not mean that international law has no sanction, if that word is used in its proper sense as means for securing the observance of the law; but it is true that sanctions which it possesses are not systematic or centrally directed, and that accordingly they are precarious in their operation". Cf. the U.S. action in the Cuban crisis (October, 1962) and the Soviet invasion of Czechoslovakia (August, 1968); see also Pitman B. Potter, "Bases and Effectiveness of International Law", 63 A.J.I.L. (1969) p. 270.







the value of the resolutions of the General Assembly - one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations - and to treat them for the purpose of this Opinion and otherwise, as nominal, insignificant, and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence.<sup>81</sup>

If such has been the conclusions reached by an eminent jurist, as well as by other authoritative publicists, it is submitted that the conduct of the new States with respect to the "law-making" capacity of the General Assembly is influenced no less by such views than by their economic aspirations or political and ideological motives.

There is another area of United Nations activity in

---

<sup>81</sup> I.C.J. Reports, 1955, p. 122. See his "Codification and Development of International Law", 49 A.J.I.L. (1955) p. 16, where his views are far less unequivocal than the above opinion would suggest. In The Development of International Law by the International Court (1958) pp. 75 et. seq., Lauterpacht analyzes the reasons for the traditionally cautious approach of the International Court to the effective development of international law through its judicial decisions; see also Jennings, "The Progressive Development of International Law and its Codification", 24 B.Y.I.L. (1947) p. 301.

Cf. Asamoah, The Legal Significance of the Declarations of the United Nations General Assembly (1966) pt. IV, sections 1,3. As early as 1948, after the Universal Declaration of Human Rights had been adopted by the General Assembly, Professor Rene Cassin of France was one of the first to assert that the Declaration had an undoubted legal value flowing from the fact that it was an authoritative interpretation of the Charter (G.A. Doc. A/C/3 SR.92).



which the economic nationalism of the new States appears to have found full expression. Under the terms of Article 55, the United Nations is committed to the promotion of international economic and social co-operation based on "the principle of equal rights and self-determination of peoples" with a view to creating "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations". Article 1 paragraph 2 stresses essentially the same objective, and paragraph 3 makes reference to the promotion and encouragement of "respect for human rights". General Assembly Resolution 626(VII) of December 21, 1952,<sup>82</sup> emphasized the importance of economic self-determination in the context of human rights. In 1955, the Third Committee of the General Assembly, probably basing its authority on the human rights provisions of Articles 1(3), 13, 55 and 76, adopted, as part of the Human Rights Covenants, a draft article on the right of self-determination. Paragraph 2 of that article provided that "The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and inter-

---

<sup>82</sup> Gen. Assembly Resolutions 1314 (XIII) of December 12, 1958 and 1515 (XV) of December 15, 1960 have all been directed towards the objective of economic and political self-determination of peoples within the meaning of Articles 1, 55 and 76.



national law. In no case may a people be deprived of its own means of subsistence".<sup>83</sup> Following this, the General Assembly set up, in December, 1959, a Commission on Permanent Sovereignty over Natural Resources, to examine the question in relation to the right of self-determination. The work of this Commission<sup>84</sup> led to the adoption of Resolution 1803 (XVII),<sup>85</sup> framed in the form of a Declaration on Permanent Sovereignty over Natural Resources.<sup>86</sup> This resolution recognizes "the inalienable right of all States freely to dispose of their natural wealth and re-

---

<sup>83</sup> J.H. Hyde, "Permanent Sovereignty over Natural Wealth and Resources", 50 A.J.I.L. (1956) pp. 854-867.

<sup>84</sup> The Commission was made up of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, Russia, the U.A.R., and the U.S.A. It was instructed to pay close attention to the rights and duties of States under international law. The Commission based its findings primarily on the U.N. Secretariat study, The Status of Permanent Sovereignty over Natural Wealth and Resources (1962), which provided massive information on natural resources in the new States, non-self-governing territories and trusteeship territories. This study also provides information on the economic activities of foreign enterprises in the new States, international agreements relating thereto, transit rights and the relevant rules of international law.

<sup>85</sup> G.A. Res. 1803 (XVII), December 14, 1962.

<sup>86</sup> As regards the adoption of this Resolution, the Assembly vote was 87 in favour, 2 against, 12 abstentions. France was one of the two States who voted against it, but the great majority of those who abstained, oddly enough, came from the Communist bloc. The Resolution was overwhelmingly supported by the new States, including the Latin American States.







sources in accordance with their national interests, and on respect for the economic independence of States". Other provisions of the Resolution include a stipulation that

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted.<sup>87</sup> However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.<sup>88</sup>

It would appear that the new States have come to look upon this particular Resolution as their "international economic Magna Carter" - a "constitutional" guarantee against foreign economic exploitation.<sup>89</sup> No wonder, then, that there is some definite inclination towards treating this as one of the

---

<sup>87</sup> C.F. Amerasinghe, "The Exhaustion of Procedural Remedies in the Same Court", 12 I.C.L.Q. (1963) pp. 1285-1325.

<sup>88</sup> Res. 1803 (XVII) para. 4; J.N. Hyde, "Economic Development Agreements", 105 Hague Recueil (1962) p. 271; cf. Shihata, "The Attitude of the New States towards the International Court of Justice", 19 International Organization (1965) p. 203.

<sup>89</sup> Castaneda, "The Underdeveloped Nations and the Development of International Law", 15 International Organization (1961) p. 38; Roy, "Is the Law of State Responsibility for Injuries to Aliens.....?" 55 A.J.I.L. (1961) p. 863 et. seq.



basic principles of the new international law. This is so because the Resolution encompasses those concepts which the new States regard as indispensable to their political and economic security, as well as independent social and cultural development. The principle of national sovereignty is strongly stressed; the primacy of national interest is recognized, and the right of "nationalization, expropriation or requisitioning... for reasons of public utility or the national interest" is reaffirmed. But such measures are also subject to the payment of appropriate compensation to the expropriated individuals.

Resolution 1803 (XVII), in the opinion of the new States, is not merely a concession to the doctrine of national sovereignty, but also a reaffirmation of the traditional doctrine of the superior interest of the State, and its competence to take measures deemed consistent with the overriding interest of public welfare,<sup>90</sup> or self-preservation.<sup>91</sup> For these States, therefore, the importance of the resolution would seem to lie in the fact that it will enable them to exercise their "sovereign economic rights" unimpeded by the threat of force, or actual intervention by a stronger, possibly a capital-exporting, State. It is

---

<sup>90</sup> Cheng, General Principles of Law (1953) pp. 36-38.

<sup>91</sup> Castaneda, loc. cit.; see speeches by Nervo of Mexico, I.L.C. Yearbook, Vol. I (1957) p. 155, and Pal of India, I.L.C. Yearbook, Vol. I (1957) pp. 157-158.



submitted that its value, under the present circumstances, would appear to be more psychological than real. The economic development of these States appears to depend, to a large extent, upon the continued investment, both public and private, of the developed nations in these countries.<sup>92</sup> For this to happen, the capital importing State must create an atmosphere conducive to mutual confidence between them and the capital-exporting States. This need has been realistically recognized by the developing countries by entering into a series of bilateral agreements with some capital-exporting States to ensure sustained flow of capital from these States to the developing countries.<sup>93</sup> West Germany has concluded such agreements with Pakistan, the Federation of Malaysia, Togo, Morocco, Liberia and Guinea. The Federation of Malaysia has entered into a similar treaty with the United States; the Republic of Cameroon has also signed a similar agreement with the United Kingdom.<sup>94</sup> Furthermore, by means of investment codes enacted by the local legislatures of the developing countries, these States

---

<sup>92</sup> Higgins, Conflict of Interests (1965) pp. 65-68; J.S. Kautsky, "An Essay in the Politics of Development", Kautsky (ed.) Political Change in Underdeveloped Countries (1962) pp. 69 et. seq.

<sup>93</sup> R.L. Friedheim, "The 'Satisfied' and the 'Dissatisfied' States", 18 World Politics (1965) pp. 20-41.

<sup>94</sup> For a fuller discussion of this see Higgins, op. cit., n. 92 above.





have demonstrated their desire to encourage the continued flow of capital from the advanced countries into their economy. In April, 1963, Ghana enacted its Investment Act, providing for tax exemptions, as a form of incentive, for certain kinds of investment activities. A similar investment code was passed by Algeria in July, 1963 with a view to attracting capital from abroad. It has all too often been argued that, in order to speed up the economic development of the new States without being encumbered by entangling political obligations,<sup>95</sup> it is preferable that aid at the public level be directed through an international organization.<sup>96</sup> All this indicates that so long as the new States remain in need of capital for their economic and social development, they are not likely to be tempted to embark on erratic measures of nationalization or expropriation. When this Resolution, however, is considered as a principle of law stricto sensu, it poses a number of intri-

---

<sup>95</sup> Those groups of States which regard themselves as non-aligned have often argued that they prefer economic aid from the advanced countries "without strings attached". There is a definite element of "unrealism" in this statement, and the donor countries appear to be little impressed by it. It would seem that purely altruistic motives have very limited place in international relations, since relations between States are often guided by expectations of mutual benefit. This, in fact, is what treaty relations entail. The whole notion of foreign aid presupposes the operation of a system of reciprocal rights and obligations.

<sup>96</sup> See, for example, U.N. Docs. E/3452 Rev. 1 (1961), and the Reports of ECOSOC for 1960, p. 46 (A/4820) and for 1964, p. 45 (A/6003).



guing legal problems. Passage of law by a recognized legislative institution generally presupposes the existence of conditions which make it probable that the law will be obeyed, at least by the great majority of its subjects, or that, in the event of non-compliance, the norms so prescribed can be enforced through reliance upon effective sanctions.<sup>97</sup> If General Assembly resolutions are to be regarded as expressive of new norms of international law, it follows that the United Nations in general and the General Assembly in particular must be treated as a genuine international legislative assembly. This implies that its declaratory resolutions must not only be seen as possessing the force of law, but as capable of being enforced in case of a violation through the application of positive and effective sanctions. Yet, when the political limita-

---

<sup>97</sup> The use of "sanction" here is not intended in the rigid Austinian sense to detract from the obvious value or validity as such of international law. Austin held that international law is not true law, but positive morality, since it is lacking in the element of sanction which is a necessary condition for the enforceability of positive law. Moreover, the international society has no superior authority in the person of a "Sovereign" whose commands the rest of the States are obliged to obey. (Lectures on Jurisprudence, 4th ed., by Campbell, 1873, Vol. 1, pp. 187-88). The debate as to the true character and binding authority of international law has not yet ended. See Green, "The Nature of International Law", 14 U. of Toronto L. Journal (1962) pp. 176-93; Morgenthau, Politics Among Nations (4th ed., 1965) p. 277 et. seq.; Williams, "International Law and the Controversy Concerning the Word Law", 22 B.Y.I.L. (1945) p. 146. But the fact that the international society still remains comparatively decentralized cannot be denied.



tions of the United Nations are considered,<sup>98</sup> it seems difficult to maintain that individual States are likely to look upon General Assembly resolutions as possessing anything but moral authority. There is nothing in the political history of that body which would suggest that the States see its role as that of a world legislature; nor is there anything in the Charter itself to hint that it was intended to "make laws" by a direct legislative process. The General Assembly, it is submitted, has always been a political forum, a voluntary association of powers who see themselves as emancipated from any limitations, except as a matter of decorum, which might be construed as subjugating them to some superior authority. Each State, or group of States, considers itself, strictly speaking, not as a means to a common end, but as an end in itself. This would appear to be borne out by the loudly proclaimed principle of "sovereign equality of all States", recognized and

---

<sup>98</sup> H. Nicholas, The United Nations as a Political Institution (1959); R. Ogley, "Voting and Politics in the General Assembly", 2 International Relations (1961) p. 156; Stanley Hoffman, "International Systems and International Law", 14 World Politics (1961) p. 205; Hans Morgenthau, "Political Limitations of the United Nations", in G. Lipsky (ed.), Law and Politics in the World Community (1953) p. 143; C. Eagleton, "The United Nations; a Legal Order?" in G. Lipsky, Ibid., p. 129; P.C. Jessup, "Diversity and Uniformity in the Law of Nations", 58 A.J.I.L. (1964) p. 341.







sanctioned by the U.N. Charter,<sup>99</sup> and by the fact that in the present world situation, some States have not only openly flouted U.N. resolutions on critical world problems, but many have acted as if there were no international law.<sup>100</sup>

Another major obstacle in the way of consolidating its so-called "law-making capacity", and perhaps endowing it with some degree of credibility, lies in the undoubted lack of certainty on the part of the States regarding the extent to which, in reality, even specialized subsidiary organs like the Sixth Committee<sup>101</sup> should be permitted to handle certain specific cases, leading to the formulation of juridically binding rules.<sup>102</sup> If, however, the new States, because of their probable advantage in numbers, wish to regard the declaratory resolutions of the General Assembly as constituting international legislative enactments, they must also be willing to accept the operation of certain factors which may affect for better or for worse

---

<sup>99</sup> Article 2(1); P.N. Baker, "The Doctrine of Legal Equality of States", 4 B.Y.I.L. (1923-24) p. 1; for a somewhat different view, see H. Weinschel, "Doctrine of Equality of States and its Recent Modifications", 45 A.J.I.L. (1951) p. 417.

<sup>100</sup> Pitman B. Potter, "Bases and Effectiveness of International Law", 63 A.J.I.L. (1969) pp. 270-272.

<sup>101</sup> B. Cheng, "International Law in the United Nations", 8 Yearbook of World Affairs (1954) p. 171.

<sup>102</sup> H. Briggs, "Power Politics and International Organizations", 39 A.J.I.L. (1945) p. 664.



the entire course of international legal development. These factors comprise power,<sup>103</sup> which is still considered an integral element of the national State, diversity of economic and political ideologies,<sup>104</sup> differences in values and moral standards, and the problem of self-assertive nationalism. All these would appear to exert no mean influence on the political conduct of affairs at the United Nations. They manifest themselves in the practice of States with respect to debating, voting and diplomatic activity. Voting patterns in the United Nations have abundantly revealed the remarkable conformity of States to political rather than legal criteria.<sup>105</sup> This is not to overlook the fact that political reality may be creative of law. Nonetheless, the general lukewarm attitude with which States approach "political resolutions" of inter-

---

<sup>103</sup> Myres S. McDougal, "The Role of Law in World Politics", 20 Mississippi L. Journal (1949) p. 253; Schwarzenberger, Power Politics (3rd ed., 1964) p. 14 et. seq.; Hoffman, "International System and International Law", 14 World Politics (1961) p. 205 et. seq.; H. Briggs, "Power Politics and International Organizations", loc. cit.

<sup>104</sup> Schwarzenberger, "The Impact of the East-West Rift on International Law", 36 Tans. Grotius Society (1950) p. 229; Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law", 45 A.J.I.L. (1951) p. 648.

<sup>105</sup> See generally, Hovet, Bloc Politics in the United Nations (1960); Riggs, Politics in the United Nations (1958); Fawcett, "The New States and the United Nations", in William V. O'Brien (ed.) The New Nations in Int. Law and Diplomacy (1965) p. 229.



national organizations, and the magnitude of the problem thereby created for the organizations as regards enforcement procedures, is, perhaps, best illustrated by the League of Nations sanctions against Italy in 1936. The sanctions were so half-heartedly applied by States members of the League that they proved of little or no value. Similarly, the United Nations Resolution of December 16, 1966,<sup>106</sup> imposing sanctions against Rhodesia at Britain's behest was such that it is still not possible to determine the full extent and effectiveness of the sanctions. It is no less difficult even to secure the positive co-operation of South Africa and Portugal which appear to be acting clearly in defiance of that United Nations resolution. Moreover, the ambivalence of the new States who tend to regard United Nations resolutions as new norms of international law is shown by the fact that some of them, confronted by cold economic and political realities, have attempted to accommodate themselves even to politically

---

<sup>106</sup> U.N. Doc. SC/Res./232 (December 16, 1966). This was a mandatory resolution of the Security Council prohibiting the supply of oil to Rhodesia by all Member-States. It was preceded by a series of resolutions beginning from 1965. (See U.N. Doc. SC/Res./216, November 12, 1965; U.N. Doc. SC/Res./217, November 20, 1965; and U.N. Doc. SC/Res./221, April 9, 1966). It seems odd, however, that the Security Council by its resolution of 9 April, 1966, merely authorized the United Kingdom to prevent the shipment of oil, by force if necessary, to Rhodesia via Beira, without the thought of applying direct enforcement measures itself.





distasteful situations. Malawi, Lesotho, Botswana and Swazi, which are placed in close proximity to South Africa with its declared apartheid policy, are cases in point. Also, while Malaysia applies boycott of South African goods, Singapore, on economic grounds, seems to consider such a policy to be inexpedient.

If the United Nations Resolution on "permanent Sovereignty over Natural Resources" is to be treated as a new norm of international law, the question arises as to whether the practice of the new States is in conformity with this proposition. In other words, on what criteria is the legal status of this norm to be determined if the current practice of the new States in international economic relations does not disclose strict compliance with this resolution. As has been pointed out, these States, impelled by what they consider to be the imperative necessity of rapid economic development, have enacted a wide range of domestic legislations, in the form of investment codes, intended to attract foreign capital. This, coupled with the fact that a large portion of their domestic economy and natural resources is still controlled and operated by foreign companies, would appear in effect to deprive the resolution of its practical significance in terms of securing the economic independence of these States.

What real legal problems has this resolution posed? The first problem, it may be suggested, arises from the



fact that there is an obvious divergence in thinking between the new States and the capital-exporting countries. Perhaps the most sensitive area of international relations thus far affected by this particular resolution is that of the property rights of aliens. This at once impinges upon the controversial doctrine of State responsibility. Before considering the substance of this controversy, it seems relevant to refer once again to the basis of the views held by the States concerning international law. The opinion of the Asian-African Legal Consultative Committee would appear to represent an authoritative statement of the position of these States.

In his speech at the Sixteenth Session of the International Law Commission, the observer for the Asian-African Legal Consultative Committee said, inter alia:

The progressive development of international law was of particular interest to Asian and African countries, which in the past had been unable to make their views known, having long suffered under imperialism and inequitable treaties, concluded without regard to their interests and needs. They were anxious to eradicate all vestiges of colonialism and foreign domination. One of the reasons for the Asian-African Legal Consultative Committee was to consider questions under examination... and to assist in the development of law and its adjustment to the requirements of a world-wide community.<sup>107</sup>

Two things are to be noted about this statement. First the progressive development of international law is one way in

---

<sup>107</sup> I.L.C. Yearbook, Vol. 1 (1964) pp. 139-40.



which the interests of the new States can be protected. Secondly, they wish to rid themselves of "unequal treaties" since this was the hallmark of the relationship between the colonial powers and the newly independent States. Their approach, then, to the problem of treaty law in particular and of international law in general becomes conditioned by the dual motive of economic security and political equality.<sup>108</sup> This indeed is as it should be, for historically States have always sought in their mutual relations to protect and advance their interests. But this can normally be accomplished by diplomatic processes; it need not be done by enacting a rule of law assumed to be binding on all States regardless of their individual preferences or the dictates of their national interests, whereas there is evident reluctance on the part of each State to submit to undesirable obligations which international enactments of this character might entail. Clearly, power politics is still a fact of international life. And realizing the unlikelihood of collective enforcement of an international legal rule against a recalcitrant State, it would be worthwhile to concentrate on those areas of international law more likely to receive the general assent and support of States while leaving ample scope for more flexible diplomatic relations.

---

<sup>108</sup> Ibid., Vol. 1 (1957) pp. 155, 157-158.





What is unique about the new States' approach to international law is that they have been led by narrow political ideologies and economic sympathies to assert "equality" as a fact rather than a relative concept, and "justice" as an attainable value rather than an ideal. Although Schwarzenberger has suggested that "international law is possible whenever two parties recognise each other as equal in status and neither of them recognises a third party as its superior",<sup>109</sup> it is possible to contend that inequality may in fact be imposed by the law, even though it is in principle committed to the end of equality.<sup>110</sup>

The reaction of the capital-exporting countries of the West to Resolution 1803 (XVII) is based on the belief that

---

<sup>109</sup> Schwarzenberger, "The Standard of Civilisation in International Law", 8 Current Legal Problems (1955) p. 219.

<sup>110</sup> This fact was well brought out in the Advisory Opinion on Minority Schools in Albania (1935) when the Permanent Court of International Justice recognized that factual equality was not necessarily the same as formal equality. While equality in law may preclude any form of discrimination, "equality in fact may involve the necessity of a different treatment in order to attain a result which establishes an equilibrium between different situations". It follows that certain cases of equality of treatment may result in inequality in fact. (P.C.I.J., Series A/B, No. 64, p. 19). A further example is to be found in the Malaysian Constitution of 1957 which incorporated provisions aimed at affording preferential treatment to the Malays, even though equality before the law was guaranteed by the Constitution (Federation of Malaya Independence Order in Council (No. 1533), Schedule 1, Section 153 (1957)). For general discussion see Green, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity", 4 Canadian Yearbook Int. Law (1966) p. 3 at p. 18.



it may well have adverse consequences for the long established principle pacta sunt servanda. From the point of view of international economic relations, this rule is held to impose on the contracting States the obligation to observe economic agreements in good faith, since the contract or treaty represents the free expression of their will to be bound by it. But the potentiality of expropriation implicit in the Resolution on "Permanent Sovereignty over Natural Resources" has proved of material importance to the new States. It has also been the cause of grave anxiety among the capital-exporting States, notwithstanding the provision that if a private interest is overridden "for reasons of necessity or security or national interest, appropriate compensation shall be paid" by the expropriating State. Implicit in this is the "minimum standard rule" which the new States have rejected in favour of "the national standards" doctrine. This anxiety has generated a revival of the old doctrines of "acquired rights",<sup>111</sup> acquisition of title, restitution,<sup>112</sup> even servitude, as well as increased emphasis on State responsibility, the rights and duties of States and

---

<sup>111</sup> Oppenheim, International Law, Vol. 1 (1955) pp. 268-283; O'Connell, State Succession in Municipal Law and International Law, Vol. 1 (1967) p. 304 et. seq.

<sup>112</sup> These are private law concepts extended by analogy into international law. See generally Lauterpacht, Private Law Sources and Analogies of International Law (1927).



the principle of "unjust enrichment".<sup>113</sup>

The capital-exporting States have insisted that nationalization or expropriation of foreign owned property situated within the territory of the expropriatory State, without appropriate compensation in accordance with international law, would not only amount to unjust enrichment on the part of the new States, but it would constitute a violation of "respect for acquired rights". They accept that the right of a State to nationalize or expropriate foreign property is conceded by international law, but only in the event of public necessity. In any case, international law also places upon the expropriating State, a duty to pay adequate compensation for the expropriated property. Such payment, having regard to the international minimum Standard, must be adequate and effective.<sup>114</sup> This doctrine has been regarded as the very basis of the international responsibility of States with regard to govern-

---

<sup>113</sup> O'Connell, "Unjust Enrichment", 5 Am. J. Comp. Law (1956) p. 2; Wortley, Public Expropriation in International Law (1959) p. 95 et seq.; McNair, "The Seizure of Property and Enterprises in Indonesia", 6 Netherlands Law Review (1959) p. 239 et seq.; Friedmann, "The Principle of Unjust Enrichment", 16 Canadian Bar Review (1938) Parts 1 and 2, pp. 243, 377; The Changing Structure of International Law (1964) pp. 206-210.

<sup>114</sup> See White, Nationalization of Foreign Property (1961) p. 38 et seq.; Drucker, "Compensation for Nationalized Property: The British Practice", 49 A.J.I.L. (1955) p. 477.







mental acts depriving an alien of his property.<sup>115</sup> In 1940, the United States invoked this formula in its note to Mexico concerning its nationalization of American oil interests when it said that "the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement".<sup>116</sup> The United States relied again on this principle in 1960 when it protested the nationalization of U.S. sugar industry by Cuba.<sup>117</sup> Similarly, the United Kingdom invoked the minimum standard rule in its pleadings in the Anglo-Iranian Oil Company case (1951).<sup>118</sup> While it is not intended to go into a detailed discussion of the doctrine of acquired right in international law, it seems pertinent to point out that this doctrine was clearly recognized by the Permanent Court of International Justice in the case concerning German Interests in Polish Upper

---

<sup>115</sup> Fachiri, "Expropriation and Int. Law", 6 B.Y.I.L. (1925) p. 159; Katzarov, "Validity of the Act of Nationalization in International Law", 22 Modern L. Review (1959) p. 639; Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 A.J.I.L. (1961) p. 545; I.L.A. Reports, 1960, p. 175.

<sup>116</sup> Dept. of State Bulletin, Vol. 2 (1940) p. 381.

<sup>117</sup> Ibid., Vol. 42 (1960) p. 158.

<sup>118</sup> See I.C.J. Reports, 1951, Pleadings (Anglo-Iranian Oil Co. case).



Silesia,<sup>119</sup> and in the German Settlers case,<sup>120</sup> and also as late as 1956 in the Lighthouses Arbitration between France and Greece.<sup>121</sup>

Although Resolution 1803 makes no reference to the doctrine of acquired rights, the attitude of the new States to the law of State responsibility, as demonstrated in the debates in 1957<sup>122</sup> and in subsequent debates on the Law of Treaties,<sup>123</sup> has been motivated by the suspicion that the law of State responsibility is designed to place upon the potentially expropriating State, the onus of compensation for the alien property affected. While accepting the legal duty to pay "appropriate compensation", they insist that this should be done "in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law". Accordingly, they have energetically propounded the "national standard principle" as a new rule of international law. Yet it must be remembered that this is what the Calvo clause sought to achieve for the Latin American countries. The principle holds that aliens are

---

<sup>119</sup> P.C.I.J. (1926), Series A, No. 7, p. 30.

<sup>120</sup> P.C.I.J. (1923), Series B, No. 6, p. 36.

<sup>121</sup> Lighthouses case (France and Greece), I.L. Rep., 1956, p. 659.

<sup>122</sup> I.L.C. Yearbook, Vol. 1, 1957, pp. 155, 157-58.

<sup>123</sup> I.L.C. Yearbook, Vol. 1, 1963, pp. 35, 63, 65, 67.



not to be accorded preferred treatment as against the nationals of a State, in the event that their private interests are affected by a specific governmental act, taken in the public or national interest. This implies that aliens must be treated on the basis of "complete equality" with the nationals of the expropriating State since the governmental action which is of an impersonal character,<sup>124</sup> is bound to affect both nationals and aliens equally.

Paradoxically, in repudiating some of the old rules inherent in the law of State responsibility, and in defending the immanent and "indefeasible" rights of States to nationalize or expropriate in the interest of public welfare, the new States have sought refuge in such classical doctrines as the Act of State. They have also tended to employ the notion of "unjust enrichment" in such a manner as to justify a possible nationalization or expropriation policy. At this point, the problem becomes a question of

---

<sup>124</sup> In response to the impassioned letter of the American government of July 21, 1938, concerning the expropriation by the Mexican govt. of American citizens' properties, the Mexican Government said: "...there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land". (Hackworth, Digest of International Law, Vol. III, p. 657).





semantic construction. White<sup>125</sup> has made the interesting observation as to the use of the term "sovereignty" by both the nationalizing State and the State whose citizens' rights may be affected by the act of a foreign Government. Thus the expropriating State may argue that it is acting by virtue of its sovereignty over its territorial jurisdiction. On the other hand, the injured State may contend that its sovereign rights include a duty to protect its nationals abroad. In the same vein, the capital-exporting States regard nationalization or expropriation of alien property without compensation as tantamount to "unjust enrichment".<sup>126</sup> But the new States appear inclined to the view that the so-called acquired rights are in themselves examples of unjust enrichment, since they are not only based on "unequal treaties", but are also the product of the colonial system. The question of unequal treaties will be treated later. Meanwhile, following the precedents set by the Latin

---

<sup>125</sup> Gillian White, loc. cit.

<sup>126</sup> This, in a sense, is illustrated by the speech of the representative of the Netherlands during the International Law Association debate on nationalization. With a note of emotion, he described the whole issue of nationalization as "an important legal and moral question whether a State is justified in taking a non-national's property without immediate payment of complete compensation". He concluded that "some would hold that this is under all circumstances a violation of the commandment 'thou shall not steal'". I.L.A. Report, 1958, 48th Conference, pp. 158-159. See also I.L.A. Reports, 1960, p. 175 et. seq.; 1962, pp. 101 et. seq.; 6 Netherlands Law Review (1959).



American countries, the Afro-Asian States tend to look askance at any suggestion involving the submission of disputes arising out of this sort of a situation to international judicial determination, based on the existing principles of international law.<sup>127</sup>

---

<sup>127</sup> In an important article, Shihata pointed out that the new States are little attracted to the World Court as a forum for settling legal questions because they believe the Court will apply those traditional rules of law framed with the intent to protect the interests of the status quo nations ("The Attitude of the New States towards the International Court of Justice", 19 International Organization (1965) p. 203; see also Castaneda, "The Underdeveloped Nations and the Development of International Law", 15 International Organization (1961) p. 38). Even today, relatively few Asian and African States have accepted the compulsory jurisdiction of the International Court of Justice under the Optional Clause. The I.C.J. Yearbook (1967-68) lists only 6 Asian countries out of 24 as against the 9 reported for 1960-61, and 9 African States out of some 40 countries as against 4 out of 28 reported for 1960-61. In 1955, the International Law Commission of the U.N. adopted a draft text on arbitration, but when this was submitted to the General Assembly, the majority of the Assembly members were unfavourably disposed to the adoption of a convention incorporating the draft. They argued that this was likely to turn arbitration into a compulsory judicial procedure, thereby destroying its traditionally diplomatic character. Thus, at the 22nd meeting of the General Assembly's Special (Political) Committee held in Mexico City on September 14, 1964, during which the subject of peaceful settlement of disputes was discussed, the Ghanaian delegate was to remark that "allegations that the Court (the International Court of Justice) was a Western court of justice were not entirely unfounded", and this, according to him, was one of the reasons why the O.A.U. Charter had omitted judicial settlement as a means of settling international disputes. (U.N. Doc. A/AC.119/SR.22, October 22, 1964, pp. 6-7).



It seems clear that in the debate between the capital-exporting States and the developing nations as to the legal effect of nationalization, both groups appear to put a different construction on the terms used. While the former constantly employ such concepts as pacta sunt servanda, bona fides, respect for acquired rights,<sup>128</sup> and unjust enrichment, the new States talk of sovereign rights, economic independence, pacta sunt servanda, and maintain that their position is based on international law. Nonetheless, this must be the "new international law", made with their consent.

The doctrine of unjust enrichment<sup>129</sup> was first employed by an international tribunal in 1930 in the Lena Goldfields case.<sup>130</sup> In that case, the Soviet Union had invited a foreign firm to develop its gold mines, and later expropriated these mines as part of its nationalization policy. The tribunal held that the Soviet Union had unjustly enriched itself by the expropriation, without compensation, of the capital assets, skill and work put into the develop-

---

<sup>128</sup> These terms were employed time and again by the leading Western delegates in the debates on nationalization at the International Law Assn. Conferences. See I.L.A. Reports, 1958, 1960, 1962, loc. cit.

<sup>129</sup> W. Friedmann, International Law in a Changing Society (1959) p. 456 et. seq.; B.A. Wortley, Public Expropriation in International Law (1959) p. 95 et. seq.

<sup>130</sup> Annual Digest of Int. Law (1929-30) Case No. 1.





ment of the mines, and should therefore make appropriate compensation or restitution for that enrichment. The concept of State responsibility has thus come to be associated with the fact that a government commits an international wrong when it takes alien property, especially property based on contractual rights, which is located on its territory. It is important here to make a distinction between "the taking of alien property" and "the nationalization or expropriation of alien property",<sup>131</sup> just as it is to distinguish agreements or contracts from a treaty. According to Hyde the taking of property by government is a measure "having the effect of appropriating or destroying alien interests".<sup>132</sup> Expropriation involves "the deprivation by State organs of a right of property by permanent transfer of the power of management or control",<sup>133</sup> usually for public purposes. Often such action provides for compensation. The mere act of the taking of alien property for public

---

<sup>131</sup> See speech by J.N. Hyde at the I.L.A. Conference (1958) loc. cit. at p. 139. He defines Government takings as amounting in essence to "frustration and failure of joint plans which had reached across national borders" (p. 140).

<sup>132</sup> J.N. Hyde, Ibid.

<sup>133</sup> Ian Brownlie, Principles of Public International Law (1966) p. 432; see also O'Connell, International Law, Vol. 2 (1965) p. 843.



utility<sup>134</sup> does not constitute a violation of international law, for such act always proceeds from sovereign right.<sup>135</sup> But where the payment of compensation is not provided for, the question of the legality of the taking may become pertinent to international law.<sup>136</sup>

C.C. Hyde<sup>137</sup> has made the distinction between a contract and a treaty. Such a distinction appears to be relevant in so far as the breach of economic contracts by a new State is concerned. A treaty is a generally recognized source of international law, whereas a contract cannot be assimilated to a treaty. The question necessarily

---

134 In the case of Certain German Interests in Polish Upper Silesia (1926), the Permanent Court upheld the principle of public utility by ruling that "expropriation for reasons of public utility, judicial liquidation and similar measures" was lawful (P.C.I.J., Series A, No. 7, p. 22).

135 Katzarov, "The Validity of the Act of Nationalisation in International Law", 22 Modern L.R. (1959) p. 639; Fachiri, "Expropriation and International Law", 6 B.Y.I.L. (1925) p. 159; Carlston, "Nationalization: An Analytical Approach", 54 Northwestern Univ. Law Review (1959) pp. 405-412; G.A. van Hecke, "Confiscation, Expropriation and the Conflict of Laws", 4 International Law Quarterly (1951) p. 345.

136 Chorzow Factory Case (1928), P.C.I.J., Series A, No. 17. The Court held that the taking of property itself would be valid even though non-payment of compensation constituted a violation of international law and hence an international wrong.

137 C.C. Hyde, International Law as Interpreted and Applied by the United States, Vol. 2 (2nd rev. ed., 1945) pp. 989-990.



arises whether the abrogation of a contract - including economic contracts not of the nature of a treaty - is violative of international law per se. It would appear that an expropriation in violation of a contract, as against that in breach of a treaty, does not constitute a breach of international law. For treaties are "a source of international law, and its violation necessarily amounts to a violation of international law".<sup>138</sup> This argument would prove, on the face of it, attractive to any new State that was interested in nationalizing or expropriating foreign owned property, since it would require the simple process of determining which category of agreements should be designated as treaties and which as mere contracts. Some caution, therefore, seems necessary in relying upon this authority in support of exclusively politically motivated expropriation. This is not to suggest that there are any class of such measures in which the political element is totally absent; indeed one authority has described nationalization or expropriation, because of its inherently political character, as "'an act of higher internal policy' by which the State undertakes the reform of the whole or a major part of its economic organisation".<sup>139</sup>

In the International Law Association debates on nation-

---

<sup>138</sup> Ibid.

<sup>139</sup> Katzarov, loc. cit., p. 640.





alization, attempts have been made to re-examine the traditional nature of the Act of State doctrine in the light of new international conditions, and some delegates have vehemently called for non-recognition of it as "a principle of international law".<sup>140</sup> This would seem to imply that this doctrine had already been acknowledged, at least implicitly, in international law. Be that as it may, the doctrine is common to the countries of the common-law system, although its equivalent is not unknown to the civil law world. It is a doctrine that bears a direct relationship to the concept of sovereignty, and has formed a part of English public law since 1674.<sup>141</sup> An important feature of the Act of State doctrine is the rule that municipal courts are denied jurisdiction to determine the validity of the acts of foreign governments performed in their capacity as sovereigns within their own territories. In this connection, the rule has been invoked with respect to foreign expropriation measures by courts of various countries. In England, this doctrine was confirmed by Luther v. Sagor<sup>142</sup>

---

<sup>140</sup> See I.L.A. Reports, 1958, p. 139; 1962, p. 101. The United States delegation at this (the 50th) Conference of the I.L.A. submitted a resolution declaring that the Act of State doctrine was not an integral part of international law. The resolution was adopted by 105 to 9 with 6 abstentions.

<sup>141</sup> Wade, "Act of State in English Law...", 15 B.Y.I.L. (1934) p. 98.

<sup>142</sup> Luther v. Sagor (1921) 3 K.B.532.



and Paley v. Weisz.<sup>143</sup> The Supreme Court of the United States recognized this doctrine in the case of Underhill v. Hernandez (1897)<sup>144</sup> when it stated that "every sovereign State is bound to respect the independence of every other sovereign State and the courts of one country will not sit in judgment on the acts of the government of another within its own territory". Yet this cannot be held to represent an inflexible maxim of judicial policy. Both the decision of the Supreme Court of Aden in the Anglo-Iranian Oil case (1953)<sup>145</sup> and the more recent ruling of the United States Court of Appeal in the Banco Nacional de Cuba v. Sabbatino<sup>146</sup> are in effect a denial of the Act of State doctrine.

But what must be borne in mind is that an act of State is merely an instrument of executive policy; it is the political exercise of sovereign power through the duly authorized

---

<sup>143</sup> Princess Paley Olga v. Weisz (1929) 1 K.B.718.

<sup>144</sup> Underhill v. Hernandez, 168 U.S. 250 (1897).

<sup>145</sup> Anglo-Iranian Oil Co. v. Jaffrate (Rosemary) (1953) 1 W.L.R., 246; I.L. Rep. 1953, p. 316.

<sup>146</sup> Banco Nacional de Cuba v. Sabbatino, 307 F. 2d (2d Cir. 1962) 864-868. By its decision of 23 March, 1964, the U.S. Supreme Court, however, reversed this judgment, refraining from making a determination with respect to the alleged unlawful character of the Cuban expropriation, and upholding the act of State doctrine (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)). But on 15 November, 1965, the District Court of the Southern District of New York, basing its opinion on the Hickenlooper Amendment to the U.S. Foreign Assistance Act of 1961, again denied the applicability of the doctrine to this particular case. Banco Nacional de Cuba v. Farr, Whitlock & Co., 243 F. Supp. 957 (S.D.N.Y., 1965).



agents of the State. The appeal of this doctrine to the new States thus appears to lie in the fact that the legality of any acts of nationalization or expropriation, which might be held to have infringed the interests or rights of aliens, cannot be challenged in the courts of foreign countries. But, in view of the decisions in the above cases, it is possible that, even if the legality of such acts are not questioned, the courts of the State whose nationals are injured may still refuse to recognize or give effect to such law. The new States have tried to circumvent any potential problems by expressing their preference for, and vigorously canvassing, the national standard rule,<sup>147</sup> whereby aliens are subject to equality of treatment with nationals; and in the event of alleged injury must first exhaust local remedies. The position taken by the new States on this issue would appear to be dictated first by the fact that they are capital-importing and debtor countries. Quite often every debtor country tries to find reasons, if possible legal reasons, for non-payment of its debts. Another cardinal reason for the refusal of the new States to accept

---

<sup>147</sup> See, for example, Asian-African Legal Consultative Committee Reports, Third session (1960) p. 83 et. seq.; Fourth session (1961) p. 46 et. seq.; cf. General Assembly's Special Committee's Report of 1966 where it is stated, inter alia, that "with regard to responsibility of States and to foreign investments many of the rules of traditional law conflicted with the interests of the new economically weak States". (U.N. Doc. A/AC.125/1.38/Add. 2, April 21, 1966, p. 38).





responsibility for injuries to aliens resulting from their domestic political and economic measures can be found in the fact that many of them have alien populations residing within their territories. These aliens often own property and other economic interests which may be adversely affected by the territorial governments' programme of socio-economic reforms. Should the issue of injury to aliens be accepted as a question of international claims, many of the new States would unhappily find their general schemes of economic reform and social development severely hampered. For this reason, the settlement of cases pertaining to injuries by an international judicial process is, in principle, less enthusiastically embraced by the new States, even though many of them have by sheer necessity accepted the IBRD Convention on Settlement of Investment Disputes between States and Nationals of Other States of March, 1965. This, it is submitted, is one significant reason why the new States have shown an inclination to treat the resolution on "Permanent Sovereignty over Natural Resources" as an entirely new international juridical norm. Yet a balance is struck between their theoretical assertion of this claim and their broad awareness of the pragmatic problem of economic development, the success of which they appear to regard as dependent upon continued technical and financial aid from the more developed nations.

The concern of the new States with the revision of international law is not limited to the problem of economic rights. The issue of political self-determination of peoples is one in which they have exhibited unique interest. Associated with self-determination are such correlative



principles as "human rights", "equality" and "peaceful co-existence" which in the view of the new States must be recognized as imperative rules of the new international law. Prior to 1945, the concept of self-determination was generally viewed as a question of policy or of morality. But with the adoption of the United Nations Charter in 1945, and the incorporation of "self-determination of peoples" as one of the objectives of U.N. policy, the emphasis has gradually shifted from the purely political to the legal character of that principle.<sup>148</sup> Article 1 paragraph 2 and Article 55 refer to the development of "friendly relations among nations based on the respect for the principles of equal rights and self-determination of peoples" as one of the purposes of the U.N. As a statement of moral commitment, the Charter mentions in the preamble its "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". On 16th December, 1952 the General Assembly adopted a resolution,<sup>149</sup> recommending, inter alia,

---

<sup>148</sup> See G.A. Res. 2105 (XX) of 20 December, 1965, and the Report of the Special Committee of 1966 where the principle of "self determination" was admitted to constitute "a rule of international law and not a mere moral precept", even though the Committee was unable to formulate the precise content of the right. (U.N. Doc. A/6547 of December 7, 1966, p. 33). Whiteman, however, considers "self-determination" as a political, rather than a legal, right. (Digest of International Law, Vol. 5, p. 38).

<sup>149</sup> G.A. Res. 637A (VII), December 16, 1952.



that "the States members of the United Nations shall uphold the principle of self-determination of all peoples and nations". Chapter XI of the Charter embodies the "Declaration Regarding Non-Self-Governing Territories" under which members of the U.N. who are the administering authorities of these territories recognize and accept at least the moral obligation to develop self-government and take due account of the political aspirations of the peoples. Furthermore, Article 76 lays down as one of the basic objectives of the trusteeship system "the advancement of the inhabitants of the trust territories" and "their progressive development towards self-government or independence".<sup>150</sup>

The influx of the Asian and African States into the United Nations since the 1950's, and the influence of the Soviet bloc of States have given rise to the development of the proposition that the principle of self-determination of peoples is a fundamental legal norm flowing from the Charter of the U.N. itself. The adoption of Resolution 1514 (XV) on December 14, 1960 as a "Declaration on the Granting of Independence to Colonial Countries and Peoples"<sup>151</sup> was not, as seen by the new States, merely acting in accordance with the purposes of the U.N., but it was an "enactment" of obligatory norm. From this premise then, the new

---

<sup>150</sup> Art. 76(c).

<sup>151</sup> G.A. Res. 1514 (XV), December 14, 1960.





States have sought to outlaw colonialism, since this is not only contrary to the new norm proclaimed by resolution 1514, but is inconsistent with the Universal Declaration of Human Rights.

To emphasize the legal character of this principle, the new States have worked to see that it is incorporated in certain international instruments to give it a universal validity. Thus it was embodied in the final communique of the Bandung Conference of April 24, 1955, in the Declaration of the Belgrade Conference of Non-Aligned Countries of September 6, 1961, and in the Declaration of the Cairo Conference of Non-Aligned Countries of October, 1964. It has also found expression in other General Assembly resolutions<sup>152</sup> and has formed the basis of subsequent action where issues affecting self-determination and human rights are involved. For instance, as regards the Moroccan question, General Assembly discussion entitled "Violation by France in Morocco of the principles of the United Nations Charter and the Declaration of Human Rights",<sup>153</sup> sought to establish that the actions of the French authorities in Morocco were in violation of the principle of self-determination. France, objecting to the Assembly discussion of the question, invoked Article 2(7), pleading that the issue was a matter of

---

<sup>152</sup> See, e.g., G.A. Res. 1815 (XVII) and Res. 1966 (XVIII).

<sup>153</sup> GAOR, 7th sess., ann., a.(i) 65, pp. 1-5 (A/2175 and Add. 1 and 2).



domestic jurisdiction. Similarly in the draft resolution of the First Committee regarding the Tunisian problem (1958), the view was expressed that the French Administration had acted in breach of human rights and the principle of self-determination. The Algerian conflict (1955) provided the General Assembly<sup>154</sup> another opportunity to invoke this principle on the grounds that the Algerian situation constituted a threat to the Peace and a breach of the Charter provisions on self-determination. More recently, the questions of South Africa, South West Africa and Angola have been discussed on the presumption that these declarations amount to a waiver of the domestic jurisdiction clause of the Charter in matters of international concern. And these involve questions relating to violations of human rights and the principle of self-determination of peoples as interpreted by the new States. Those countries of the West with continuing colonial responsibilities are more inclined to invoke the doctrine of domestic reserve in an attempt to exclude from the U.N. competence the discussion of these matters which are thus construed as falling within the domestic jurisdiction of the States concerned.

As newly emancipated States, the assertion of the principle of self-determination as a new principle of universal international law is not unconnected with their historical

---

<sup>154</sup> GAOR, 10th sess., ann., a.(i) 64, p. 1 (A/2924 and Add. 1).



experience and their desire for political freedom and security. From this principle, the new nations appear to have derived, as a corollary, "the obligation" to support national liberation wars, particularly where the object of such wars is the overthrow of a colonial regime. Thus in December, 1961, India found it necessary to use armed force against the Portuguese authorities in Goa. Portugal, itself a colonial power, alleged that India had committed an act of aggression against "Portugal in Goa", contrary to the provisions of Article 2 paragraph 4, prohibiting the threat or use of force by member States in their international relations against the territorial integrity and political independence of any State.

In the Security Council debate on Goa, the Indian representative argued that the end of eliminating colonialism was in itself a justification for the means employed. Relying on Article 51 of the Charter, he pleaded that

The measures taken by India were for the protection of the Goan people, who were in revolt against Portugal. Portugal has concentrated 12,000 soldiers in Goa where they also had mined public buildings.... The Charter provides that force can be used in self-defence - for the protection of the people of a country - and certainly the Goans were as much Indians as any other Indians.<sup>155</sup>

Two years later, the Algerian delegate on the Sixth (Legal) Committee of the General Assembly was again to invoke

---

<sup>155</sup> Speech by C.S. Jha of India, cited in Q. Wright "The Goa Incident", 56 A.J.I.L. (1962) p. 620.





Article 51 in defence of the OAU Charter. He said in response to the United Kingdom delegate's statement:

The Charter itself contemplated the lawful use of force in certain circumstances. One of these circumstances was individual or collective action in the exercise of the right of self-defence. The Addis Ababa Conference had simply exercised that right by providing for collective action to assist national liberation.<sup>156</sup>

The new Afro-Asian States have thus maintained that the principle of self-determination, which has been recognized by the United Nations in Resolution 1515 (XV), is a general principle of international law. If this principle is to have any meaning at all, they contend, it ought to be defended against a colonial power which attempts by force to deny it. By this definition, colonialism is seen to be in a state of permanent aggression against these countries.

It is one of the paradoxes of international law that while, on the one hand, the use of force is prohibited (e.g., Art. 2(4)), on the other hand, the employment of force is conceded as an inherent right of States (Article 51) in that it permits the use of force in self-defence - individual or collective. Accession to the Charter, however, would seem to imply acceptance of the obligations entailed in Article 2(4), except in the event of self-defence against armed attack. But it has been argued that Article 2(4) must

---

<sup>156</sup> GAOR., 18th sess., 6th Cmttee., p. 125, para. 13; see Article II para. 4 of the OAU Charter; Boutros-Ghati, 546 Int. Conciliation (1964) p. 31 et. seq.



be read conjunctively with Chapters VI and VII of the Charter, particularly Article 39 which deals with "any threat to the peace, breach of the peace, or act of aggression".<sup>157</sup> All too often, the new States have contended that, besides being in a state of aggression against them, "colonialism is a threat to the peace". Consequently, the struggle against colonialism is interpreted as an international struggle since colonial regimes constitute "illegal de facto occupation" of their territories, thus making it necessary and legal to secure all possible aid from the outside. It is clear, however, that Article 39 confers upon the Security Council the sole discretionary competence to determine what situations constitute a "threat to the peace, breach of the peace, or an act of aggression".<sup>158</sup> Under the terms of Article 41, the Security Council may ask member-States to take economic or diplomatic measures, or military measures under Article 42, if there has been a prior finding of a

---

<sup>157</sup> Bowett, Self-Defence in International Law (1958) p. 147; Higgins, The Development of Int. Law through the Pol. Organs of the U.N. (1963) pp. 197-216; cf. The Report of the Sixth Committee of the General Assembly for the 21st session (Doc. A/6547 of 7 December, 1966, p. 20 et. seq.).

<sup>158</sup> At San Francisco, the Third Committee decided "to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression". (Report of Rapporteur of Committee 3 to Comm'n III, UNCIO, Docs. XII, 505).



threat to the peace, breach of the peace, or an act of aggression. It does not seem that individual or collective measures would be permitted for reasons of political antipathy alone, even if it could be established that a given regime or State governs in a manner inconsistent with the Universal Declaration of Human Rights. By reason of Article 25, and a fortiori, by accepting membership in the United Nations, all States have accepted the allocation of this discretionary authority to the Security Council. So far as the plea of self-defence is concerned, a State purporting to act in self-defence has the onus of establishing that an armed attack had actually occurred, as required under Article 51. In case of anticipatory self-defence, such a State must be able to show that the situation was so immediate and overwhelming<sup>159</sup> that it was left no other alternative. International law does permit the resort to force under such

---

<sup>159</sup> The Caroline Case (Moore, A Digest of Int. Law, Vol. VII, p. 919; Vol. II, p. 409. The correspondence between Great Britain and the U.S. in this case has been regarded as the classic formulation of the basis on which the invasion of a neighbouring territory can be justified under the concept of self-defence. There must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation". The action taken must not be "unreasonable or excessive", and limited by that necessity and kept clearly within it.





exceptional circumstances.<sup>160</sup> But Article 51 also requires that measures taken in the exercise of the right of self-defence shall be immediately reported to the Security Council. It would follow, therefore, that failure to comply with this stipulation is, to say the least, some evidence that such measures are in fact not defensive. If the claim of antici-

---

<sup>160</sup> It has been suggested that an act in self-defence is permissible in a situation where an attack is expected not by a neighbouring State but from it, and that a violation of a neighbour's frontier by the threatened State in such a situation would amount to an act of self-defence directed not against the neighbour, but to protect the acting State's own territory. See, for example, Stone, Aggression and World Order (1958); Fitzmaurice, "The Definition of Aggression", 1 I.C.L.Q. (1952). None of these conditions appears to have been fulfilled by the African States who regard colonialism as an aggression.

In the Tunisian question of 1958, the Tunisian Government had complained to the Security Council of French aggression in the form of bombings and violence at Sakiet-Sidi-Youssef. Tunisia forbade the movement of all French troops on its territory, warning that if that prohibition was not observed, "the Tunisian Government would then consider itself in a State of self-defence". (SCOR, 13th yr., S/3951, 13 February, 1958; SCOR, 13th yr., S/4013, 29 May, 1958).

In response to this, the French delegate stated categorically that since Article 51 requires an armed attack, the right of self-defence could not be invoked in a condition less than an armed aggression, and that the single incident at Siakiet-Sidi-Youssef could in no way be considered an armed aggression (SCOR, 13th yr., 819th meeting). It should be noted, however, that the claim of self-defence against indirect military aggression was also made by France during the Franco-Tunisian conflict. France maintained that her bombing of Siakiet-Youssef was defensive since this was the rebel garrison for the National Liberation Front, training recruits and providing arms. (SCOR, 13th yr., 819th meeting).

See generally, Green, "Armed Conflict, War and Self-defence", 6 Archiv. des Volkerrechts (1956-57) p. 387.



patory self-defence is made, it would appear necessary for the State taking the defensive action to conform to the traditional requirement of "proportionality and reasonableness" as stipulated in the Caroline case, and confirmed in the U.N. debate on the Israeli-Egyptian issue of 1956.<sup>161</sup>

What must be noted about the new States' assertion of the right of self-defence is that it is not merely seen as a corollary of the right to self-determination, but also as an instrument in the pursuit of a "just war". This is clearly illustrated by the Indian argument on the Goa incident. It must be admitted that the problem of defining self-defence<sup>162</sup> is by no means an easy one, since it is possible for a State to invoke the principle in any situation subjectively determined as a case of self-defence. The mutual accusations between France and Tunisia (1958), Israel and Egypt (1956) and the Organization of African Unity and Rhodesia are ample evidence of the confusion which this principle may create. A State which invokes the concept of self-defence first, does so in the hope that it will not be accused of

---

<sup>161</sup> SCOR, 11th yr., 748th mtg., p. 7. The Australian delegate remarked that Israel's suffering at the hands of Egypt did not warrant retaliation of this kind; and the Chinese delegate said: "The action taken by Israel is disproportionate to the wrongs that Israel says it has suffered". (Ibid., p. 22).

<sup>162</sup> See, Green, "Armed Conflict, War and Self-Defence", loc. cit.; Kelsen, The Law of the United Nations (1950) pp. 269, 291 et. seq.; Stone, Legal Controls of International Conflict (1954) esp. Ch. IX.



being the aggressor or the initiator of force. If self-defence is invoked every time a State imagines that its interest is endangered, it is possible that such may lead to the creation of conditions conducive to endless wars between States, since each State is likely to believe very strongly in the justness of its cause. In the end this will serve to defeat even the aim of the U.N., which is "the maintenance of international peace and security". Strictly speaking, those new States which argue that use of force against a colonial regime, or in support of a national liberation movement fighting for self-determination is justified by the United Nations Charter and international law, are in effect saying that each State or group of States reserves the right to determine unilaterally whether or not another State is in breach of accepted rules of international law. Professor Bowett has rightly observed, in reference to the United Nations and its member-States, that

The individual members cannot on the one hand delegate primary responsibility for the maintenance of international peace and security to the Security Council (Art. 24), and on the other claim this right of unilateral action to support any State which they consider to be acting in self-defence. This sort of freedom of alliance cannot stand together with a system of collective security as centralized as the United Nations Charter. The Charter clearly intends that the prohibition of Article 2(4) will admit of only the minimum exception of self-defence, strictly construed, and subject to the overriding authority of the Security Council.<sup>163</sup>

---

<sup>163</sup> Bowett, Self-Defence in International Law (1958) p. 218.







It need be pointed out, however, that the invocation of the formula of self-defence is not peculiar to the new States, for historically States have always relied on this rule in an attempt to advance their political or ideological interests.<sup>164</sup> But the use of this principle by the new Afro-Asian States is of particular interest to us in view of the widely held belief that the new States are out to "reform" international law to take account of the new structure of the international society. It would appear more true to say that the new States, like the old ones, are engaged in an international pursuit of their political and ideological interests, which they rationalize, when expedient, with a veneer of legality.

Since the central focus of this study is the succession of the new States to treaties, it seems pertinent to examine briefly here the general theoretical approach of these States to the subject of treaty law. It is only in this way that one could appreciate fully the specific issues of their contention and the general orientation of their foreign policies. When the International Law Commission was

---

<sup>164</sup> Cf. American intervention in the Vietnam war which has been described as a case of "collective self-defence". See Dept. of State Office of the Legal Adviser, "The Legality of the U.S. Participation in the Defence of Vietnam", cited by Wright, 60 A.J.I.L. (1966) p. 750. On the arguments pro and con American participation in the Vietnam war see Richard A. Falk (ed.), The Vietnam War and International Law (1968).



set up in 1948 under the mandate of Article 13 of the United Nations Charter, it was charged with the function of developing and codifying the law.<sup>165</sup> The Statute of that Commission defined codification "as meaning the more precise formulation and systematization of rules of international law in the fields where there already has been extensive practice, precedent and doctrine". It defined progressive development "as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law is not as yet sufficiently developed in the practice of States". With the increased membership of the Commission, the new States now number not less than ten. It is by participating in this Commission that these new States have hoped to "assist in the develop-

---

<sup>165</sup> As to the question of development of the law, some authorities have argued that the distinction between "progressive development" and "codification" is a relative one since a systematic re-statement of the law involves more or less "law-making". See, e.g., R.Y. Jennings, "The Progressive Development of International Law and Its Codification", 24 B.Y.I.L. (1947) pp. 301-304; H. Lauterpacht, "Codification and Development of International Law", 49 A.J.I.L. (1955) p. 16; J. Stone "On the Vocation of the International Law Commission", 57 Columbia L. Rev. (1957) p. 16; Herbert W. Briggs, The International Law Commission (1965). In the Report of the Sixth Committee of the General Assembly during the 21st session in 1966, it was noted that "it would... be undesirable to try to distinguish sharply between existing law and developing law, or between codification and progressive development; gaps had to be filled and logical consequences of rules could be included". (U.N. Doc. A/6547 of December 7, 1966, p. 21).



ment of international law and its adjustment to the requirements of a world wide community".<sup>166</sup> In addition to the work of the International Law Association in this area, regional legal agencies have been organized with a view to clarifying the law and practice on matters of common concern to these nations. Such regional agencies include the Asian and African Legal Consultative Committee, which first came into existence on 15 November, 1956, under the name Asian Legal Consultative Committee.<sup>167</sup> Its statute was re-organized in April, 1958 to permit the participation of the new African States. The Committee has worked in close co-operation with the International Law Commission of the U.N. as well as with other international bodies. This co-operation includes the exchange of observers at meetings or conferences, and of documents, with the aim of enabling each group to make its views known on matters that are of special concern and interest to them. In order to crystallize their views, and co-ordinate their legal policies, Asian-African Jurists' Conferences (an important instrument of the new States) are convened from time to time. The sole objective of these conferences is to formulate and declare new legal

---

<sup>166</sup> Mr. Sabek (Observer for AALCC at 16th Sess. of I.L.C., I.L.C. Yearbook, Vol. I (1964) p. 44.

<sup>167</sup> Burma, Ceylon, India, Iraq, Japan and Syria constituted the foundation members. The representatives were appointed by the governments of these countries. The Headquarters of the Committee (Secretariat) is located at New Delhi, India.







rules, defined from the point of view of the new States, which are seen as appropriate to the needs of the "new system of public international law". The United Nations Special Committee on "Principles of International Law Concerning Friendly Relations and Co-operation among States", which was set up by the General Assembly in 1963,<sup>168</sup> has also proved functional in lending support to the new States' drive to have such principles as "peaceful co-existence" codified as a new norm of international law, and the legitimacy of "wars of national liberation" recognized. In this, the new States have received the unflinching support of the Soviet bloc, which has spearheaded the advocacy of these principles as the universal norms occasioned by the various international developments which have occurred since the United Nations Charter was drafted.<sup>169</sup> In this connection,

---

<sup>168</sup> G.A. Res. 1966 (XVIII).

<sup>169</sup> At the Seventeenth session of the General Assembly, the Czechoslovak delegate, speaking on peaceful co-existence, maintained that "The principle of peaceful co-existence had permeated contemporary international law. It was reflected in the existence of the United Nations, the Charter of which was based on recognition of the common interest of all nations in the maintenance of international peace and security. In prevailing conditions, the intrinsic value of international law resides in its promotion of the peaceful co-existence of States.... The development of international law was closely linked with profound changes in the structure and character of the international community. The growth of the socialist system, the disintegration of the colonial system, the liberation of many dependent countries, and the emergence of new social forces had democratized international relations, multiplied (continued on page 92)



it was even pointed out by a member of the Asian-African Legal Consultative Committee in his remarks to the International Law Commission in 1964, that the Afro-Asian States strongly believed that the time had come for the Charter to be reviewed in accordance with Article 109. Since many of the new States had not taken part in its negotiation, the Charter could not reflect the consensus of opinion of the present members of the United Nations.<sup>170</sup> Thus the consensus theory is again invoked as grounds for the "necessity" of revising the Charter.

---

169 (continued)

the subjects of international law, and widened the sphere of its application". (GAOR, 17th sess., 6th Cmttee., 753rd Mtg., pp. 96-97). However, with the Soviet invasion of Czechoslovakia in August, 1968, it appears as if the original notion of socialist peaceful co-existence, whether passive or active, has undergone drastic modification with a new formulation of Soviet international law consequent thereon.

Ceylon, resting its support of the "legal principle of peaceful co-existence" on the moral propriety of that principle, warned that "the Asian-African countries would not tolerate such an immoral basis for international law as the principle of self-interest if they were to be the victims of international exploitation". (GAOR, 18th sess., 6th Cmttee., 805th Mtg., p. 126).

The older Western States based their opposition to the principles on the grounds that these concepts were of largely ideological value or represented only the policy objectives of States, and as such were incapable of precise formulation as legal principles. (See U.K. delegate's speech, Ibid., pp. 123-125; United States delegate's view, Ibid., pp. 145-148).

<sup>170</sup> I.L.C. Yearbook, Vol. II, (1964) p. 122.



In relation to the problem of treaties as such, the new States have displayed particular sensitivity to the issue of unequal treaties, and have come to regard it as a strong ground for invalidity, since it is believed that unequal treaties imply inequality of relationships as well as inequality of obligations between the parties.<sup>171</sup> This somewhat excessive concern with unequal treaties stems from the fact these treaties had recognized and formalized, in the 19th century, the colonial rights of the European Powers to the exclusive control and economic exploitation of their overseas territories.

Earlier in 1957, the Afro-Asian Jurists Conference, in its effort to formulate new principles of public international law, had defined unequal treaties as "treaties establishing gross inequality between the obligations of the parties".<sup>172</sup> However, this attitude of the Afro-Asian States has been vastly influenced by the Soviet concept of "leonine treaties",<sup>173</sup> which they regard as null and void. The theory of leonine treaties owes its origin to Roman con-

---

<sup>171</sup> I.L.C. Yearbook, I, (1957) p. 155; Ibid., I (1963) p. 69; GAOR., 17th sess., 6th Cmttee., 739th mtg., p. 23; GAOR., 18th sess., 787th mtg., p. 31.

<sup>172</sup> Afro-Asian Jurists' Conference, 1957, Damascus Bar Association, p. 233, cited by G. Tunkin, I.L.C. Yearbook, I, (1963) p. 69.

<sup>173</sup> See the speech by the delegate of Czechoslovakia at the 6th Committee meeting in 1963 (GAOR., 18th sess., 787th mtg., p. 31).





tract law. Such contracts were said to create a type of legal relationship between the parties, in which one partner gets the benefit while the other bears the burden. Hence this was described as a "societas leonina",<sup>174</sup> or "a partnership with a lion", and ipso facto null and void. In a forceful argument by which he sought to establish the invalidity of treaties on the basis their "unequal" nature, the Czechoslovak member of the International Law Commission asserted unequivocally that:

The development of the rules governing the conclusion of international treaties and their validity and position in law was influenced by the conditions existing in the international community. In codifying the law of treaties, the Commission should be guided by the real needs of international relations, the promotion of peaceful co-existence, the requirements of international legality and the need to eliminate all vestiges of inequality in treaty relations between States. Unequal treaties, treaties violating the principles of peaceful co-existence or otherwise endangering peaceful and friendly co-operation among peoples, could not be described as international treaties in the legal sense.<sup>175</sup>

In this sense, the Ukrainian representative<sup>176</sup> on the Sixth Committee held that "leonine agreements which some colonial Powers had concluded with their former colonies" are void since they are violative of peremptory norms of international law. The Mongolian delegate expressed the view that the

---

<sup>174</sup> Black's Law Dictionary (1951) p. 1047.

<sup>175</sup> GAOR., 17th sess., 6th Cmttee., 739th Mtg., p. 23.

<sup>176</sup> Ibid., 908th Mtg.



main effect of Article 50 of the Draft Articles on the Law of Treaties was to declare unequal treaties null and void.<sup>177</sup> Tanzania and Algeria expressed similar sentiments when they declared that unequal treaties constitute an infringement of jus cogens.

Here there is a ready correspondence between the attitude of the Soviet bloc and that of the new States, for reference to unequal treaties immediately evokes the negative emotion invariably associated with the question of colonialism and political subjection. But it would be wrong to suppose that this particular position necessarily represents the consensus, in practice, of the new States. The mere fact that these States are constantly entering into different types of treaty relations (of an apparently unequal nature) with the more powerful, capital-exporting States, makes it exceedingly difficult to maintain that these States' attitude towards "unequal treaties" is in any sense evidence of a policy of action, rather than that of "declaration" or of protest. In fact, Professor Pal of India, himself a member of the International Law Commission, has criticized the Soviet view of unequal treaties as implying the possibility of indiscriminate invalidation of all treaties between a great Power and a small State on the ground that the former benefited out of proportion to the

---

<sup>177</sup> Ibid., 911th Mtg.



obligations assumed by the latter.<sup>178</sup>

How, it may be asked, does the new States' approach to international legal problems affect the character of their foreign policies? This at once raises the corresponding question: What is the objective of foreign policy? If we accept George Modelski's terse definition of the aims of foreign policy as "the future desirable behaviour of other States"<sup>179</sup> then it becomes possible to infer that there is a necessary relationship between a State's conception of the future desirable behaviour of other States and its actions in relations with the outside world.<sup>180</sup> National interests of States become defined in terms of objectives, the realization of which is a crucial concern of foreign policy. National interest has long been recognized as a permanent index of a State's international policy.<sup>181</sup> This implies a complex of demands, wishes, desires and wants which a State associates with its policy objectives, and uses as a determinant of its behaviour in relation to other States under given conditions and circumstances. The interests themselves may be political, economic or purely

---

<sup>178</sup> I.L.C. Yearbook, Vol. 1 (1963) p. 70.

<sup>179</sup> Modelski, A Theory of Foreign Policy (1962) p. 9.

<sup>180</sup> Ibid., p. 10.

<sup>181</sup> Morgenthau, Politics Among Nations (1965) 562.





ideological, but they must, in the last analysis, correspond, however approximately, to what it conceives as its national welfare and general security.

The pursuit or achievement of interest or policy goal at once raises the question of means. The means used by States in pursuit of their interest has often in the literature of international relations been referred to as power.<sup>182</sup> But a note of caution is necessary here so far as the concept of power is concerned. A conception of power as the sole end of international politics,<sup>183</sup> is bound to obfuscate issues and render an intelligible analysis of the nature of current international politics impossible. A purely power-political approach to problems of contemporary international relations makes a proper understanding of the behaviour of the new States difficult, for the traditional conception of "power politics" carries with it the implied connotation of "brute force" as the ultimate end of the political behaviour of States. While the element of power is not ruled out as an important factor in the political relations of States, it cannot be regarded as the sole end of international politics. Power is a useful concept for analysis of problems of international action of States if it is realized that it may mean more than just their actual

---

<sup>182</sup> Ibid., pp. 23, 36; Modelski, loc. cit., p. 21 et. seq.

<sup>183</sup> Morgenthau, Ibid., p. 36; Schwarzenberger, Power Politics (1964) p. 14 et. seq.



or potential military capacity. For the purposes of this analysis it seems fruitful to see power as capable of taking different forms - military, material, psychological, and even verbal, besides the traditional categories of national and governmental power. With regard to the power of the new States vis-a-vis the industrialized countries, the new States - assessed in purely military terms or in terms of industrial potential - are bound to rate far below the advanced countries. But with respect to the psychological and verbal components of power, the new States would seem to be on a par with the older States. With their attainment of political independence and accession to membership in the international society on the basis of sovereign equality with the more advanced States, they have found themselves faced with the necessity of protecting and advancing their interests in competition with other States. As weak States - politically, economically and militarily - sandwiched between two military giants - the United States and the U.S.S.R. - they have sought to meet the first political requirement of survival through the proclamation of a policy of non-alignment. Its basic objective had been to acquire ample room within which to manoeuvre in order to secure their interests.

The United Nations must, in realistic terms, first be seen as a political forum in which States air their views, declare their policies, seek to influence the opinions and



attitudes of other States, and adjust their interests. But their success in all this does, in the end, depend upon a composite of factors, including a substantial degree of political ability. The United Nations is also a new instrument for the regulation of peaceful relations among States. It is its commitment to the development of "friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples"; its desire "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion"<sup>184</sup> that has made the U.N. a promising instrument for the advancement of the interests of the new States. Moreover, the concern of the U.N. to develop and expand the scope of law as the basis of peaceful international relations, in conformity to a changed world situation, has encouraged the desire of the new States to reassess some of the fundamental postulates of international law.

The objectives of the new States include decolonization, the maintenance of independent political and economic systems under guarantees safeguarding full international respect for their sovereignty, a desire to rid themselves

---

<sup>184</sup> Art. 1 paras, 2 and 3.





of crippling obligations resulting from "unequal treaties" or other sources of law in the establishment of which they played no part, and beneficial participation in various international institutions and other forms of economic co-operation. These aspirations have formed the central aim of their foreign policy, and have conditioned their attitude and approach both to international law and to the politics of international institutions. Realizing their limitations of military and economic power, they have sought to exploit their numerical strength in the U.N., and to erect into law norms embodying their aspirations. It is in this that they appear to find the only hope for their future security.

The new States have found their "moral allies" in the Communist States, as well as in the Latin American countries, who themselves have been anxious to eliminate the remnants of inequality in international relations. In seeking to change some of the existing rules of international law, they have almost unwittingly, appealed to old doctrines of international law, including the consensual theory which is the hall-mark of rigid positivism. The older doctrine of sovereign equality of States has frequently been invoked along with "the principle of self-determination of peoples", which they regard as one of the newest principles of international law. But this principle is carefully defined to limit its applicability to purely colonial situations, for



a liberal interpretation of this new doctrine might well lead to the disruption of the political integrity of the new States themselves since most of them are multi-national or multi-ethnic in composition.

Thus, the Congo, Nigeria, and the Sudan have found it necessary to suppress by force of arms internal revolts conducted by dissident groups in the name of "self-determination of peoples". The concept of self-defence has undergone a re-interpretation to include the legitimacy of national liberation movements struggling to overthrow colonial regimes, especially those in pursuit of distasteful domestic policies. Under the pressure of the new States, the United Nations is gradually assuming the role of a quasi-parliamentary institution, whose newly created norms of a declaratory nature are considered as qualitatively binding upon all States. In this connection, the new States, with the support of the Soviet bloc of States, have advocated the declaration of the "principle of peaceful co-existence" as a new international legal norm,<sup>185</sup> the vagueness of its specific legal content notwithstanding. At the same time, they have insisted that non-intervention must be upheld as a new principle of international law,<sup>186</sup>

---

<sup>185</sup> See, for example, Gen. Ass. Draft Res. (A/5192, A/C6/L.505, A/C.6/L.507 and Add. 1).

<sup>186</sup> Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX) of 21 December, 1965.



and the use of force against States in the context of Art. 2(4), must be prohibited. This includes all manner of force - political, economic and cultural. In handling this problem, the Special Committee of the General Assembly, in its draft resolution on friendly relations among States, was to emphasize the grave illegal character of economic aggression, declaring that "all forms of pressure, including those of a political and economic character, which have the effect of threatening the territorial integrity or political independence of any State", fall properly within the meaning of force.<sup>187</sup> But the admission of the legitimacy of national liberation movements, particularly those operating from a foreign territory in a manner liable to inflict serious economic or political injury upon another State, whether under a de facto or de jure government, would appear to infringe this requirement.

The basic purpose of the foregoing analysis has been first to assess empirically the role of the new States in international law and relations, and to evaluate the character of the new norms purported to have been created by the U.N., with the consent of the new nations, and regarded as the only general norms of international law that are universally valid under contemporary conditions. A relatively detached investigation, it has been felt, calls less

---

<sup>187</sup> G.A. Doc A/6230, p. 23.





for an approach, sometimes adopted by scholars from the underdeveloped world, which requires that official statements of the various countries be recited and justified. Quite the contrary, the object of this study has been to examine such official statements as critically as possible, and to appraise them against both the factual conditions of international life and the actual conformity of the new States to the "new rules of law". An appreciation of the real factors underlying the legal policy of the new States towards problems of international politics will enable one to determine whether the new norms so proposed are intended for all practical purposes to acquire the obligatory force of law, or whether they are merely formulations intended to provide ostensible legal justification for the pursuit of certain types of political, economic or ideological goals. If they are accepted as new universal international law, how much of the consensus of States do they reflect? If not, what are the chances of their enforcement, even on a purely voluntary basis by States, for the binding force of international law still depends to a large extent upon the consent, express or tacit, of States?

What this study has revealed, so far as the attitude of the new States to the existing international law is concerned, is a pattern of ambivalence and at times incon-



sistencies<sup>188</sup> regarding certain established rules of international law. They appear inclined to accept more readily those traditional rules which conform to their interest without a plea of lack of consent. Such rules include sovereignty, equality, self-defence, and territorial jurisdiction. Those which are not in accord with their national interests are immediately rejected and replaced with new ones, the content of which may not necessarily accord with the interest of other, especially the older, States. Under these circumstances, it would appear that the only valid propositions that can be advanced are that the new States' challenge of the universality of the old norms of international law is in reality a challenge of the interpretation of those norms; the new States' approach to international law reflects a conflict of economic and political interests, which in turn condition their foreign policies; by seeking to enact new rules of law, the new States are engaged in the traditional game of international politics, attempting to protect and advance their interests in a manner commensurate with the means at their disposal. They have thus attempted to erect into law concepts which are likely to afford them the desired protection against the encroachments of the more powerful States. In the pursuit of their political, economic or ideological objectives,

---

<sup>188</sup> See Dugard, "The Organization of African Unity and Colonialism", 16 I.C.L.Q. (1967) p. 157.



they have put great reliance upon the "new legal norms", emphasizing justice as the sole end of international law, and morality as its only basis. Thus, like the old States, the new ones have employed international law as a basic instrument of foreign policy, either of co-operation or of conflict. The invocation of a given legal formula becomes determined by the character of the specific ideological or political struggle under given conditions. But even if it could be argued that the new legal proposals, particularly those declared by the General Assembly of the United Nations de lege ferenda, will, by an evolutionary process, be transmuted into binding legal obligations, pragmatic considerations of economic and social life as well as of international relations, have made it inevitable, so far, for the new States to work largely within the framework of the existing law. Politics is still the art of the possible.





## CHAPTER II

### THE CONCEPT AND THEORY OF STATE SUCCESSION

#### 1. The Concept of State Succession

The problem of State succession occurs when one State ceases to exist or to rule in a given territory and its place is taken by another.<sup>1</sup> Thus, O'Connell describes State succession as "the factual situation which arises when one State is substituted for another in sovereignty over a given territory".<sup>2</sup> Sir Humphrey Waldock, Special Rapporteur on the Succession of States and Governments in respect of treaties, in his first report to the International Law Commission of the United Nations, defined State succession as "a change in the possession of competence to conclude treaties with respect to a given territory".<sup>3</sup> The term "competence" rather than "sovereignty" was employed since it was thought to be susceptible of covering a greater number of international situations, such as international man-

---

<sup>1</sup> Oppenheim, International Law, Vol. 1 (8th ed., 1955) p. 157; Whiteman, Digest of International Law, Vol. 2, p. 754; Baty, "Division of States: Its Effects on Obligations", 9 Grotius Transactions (1923) p. 119; Castren, "Aspects recents de la succession d'Etats", 78 Hague Recueil (1951) p. 385; "On State Succession in Practice and Theory", 24 Nordisk Tidsskrift (1954) p. 55; A.G.M. Onory, La Succession d'Etats aux Traites (1968) p. 13; Hershey, "The Succession of States", 5 A.J.I.L. (1911) p. 285; Vallat, "Some Aspects of the Law of State Succession", 41 Grotius Transactions (1956) p. 123.

<sup>2</sup> O'Connell, State Succession in Municipal Law and International Law, Vol. 1 (1967) p. 3.

<sup>3</sup> U.N. Doc. A/CN.4/202, para. 2(a), Draft Article 1; GAOR, 23rd Sess., Suppl. No. 9 (A/7209/Rev. 1), May-August, 1968, p. 25.



dates, territories under trusteeship, protectorates, or maritime zones over which the coastal State may exercise limited jurisdiction. However, in the ensuing debate<sup>4</sup> on "State succession", some members of the International Law Commission expressed the view that the concept of "sovereignty" was indispensable to any definition of "State succession" since it is intended precisely to exclude certain situations, for instance, those resulting from a military occupation.

For analytical purposes, a distinction must be drawn between "succession in fact" and "succession in law",<sup>5</sup> both of which have a bearing upon the legal personality or the international identity of a State.<sup>6</sup> "Succession in fact" may occur when the international identity of a State is affected, in whole or in part, through annexation, cession, real union, federation, dismemberment, or secession.<sup>7</sup> But it may also involve evolu-

---

<sup>4</sup> GAOR, 23rd Sess., Suppl. No. 9 (A/7209/Rev. 1) p. 25; 8 International Legal Materials (January, 1969) p. 172.

<sup>5</sup> Mervyn Jones, "State Succession in the Matter of Treaties", 24 B.Y.I.L. (1947) p. 360; Whiteman, Digest, Vol. 2, p. 754; A.P. Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 476.

<sup>6</sup> C. Marek, Identity and Continuity of States in Public International Law (1968) pp. 2-3, 9; Hershey, "The Succession of States", 5 A.J.I.L. (1911) pp. 285-89; Oppenheim, op. cit., p. 157 et. seq.; McNair, Law of Treaties (1961) pp. 589-93; Onory, op. cit., n. 1 above, pp. 9-20; Hackworth, Digest of International Law, Vol. 1, p. 524 et. seq.; Fenwick, International Law (4th ed., 1965) p. 172.

<sup>7</sup> Lester, loc. cit., p. 476.



tionary changes in the treaty-making capacity<sup>8</sup> of a State, which transforms it from a politically dependent status to full statehood. Examples are the older Dominions in the Commonwealth of Canada, Australia, New Zealand, India and Burma.<sup>9</sup> Some authorities see such changes as endowing a State with international personality;<sup>10</sup> McNair believes that they may lead to international recognition,<sup>11</sup> at least to the extent that other States may be willing to enter into contractual relations with it.

"Succession in law" is brought about as a result of the effect of change of sovereignty in international law.<sup>12</sup> The fact

<sup>8</sup> Ibid.; O'Connell, "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 89 et. seq. As McNair has pointed out, the treaty-making capacity is no longer exclusively confined to States, since non-State entities may possess recognized treaty-making competence. Law of Treaties (1961) p. 755; see Reparations for Injuries Suffered in the Service of the U.N., I.C.J. Rep., 1949, p. 179.

<sup>9</sup> O'Connell, op. cit., n. 2 above, Ch. 2.

<sup>10</sup> Hall, International Law (8th ed., 1924) p. 114.

<sup>11</sup> McNair, The Law of Treaties (1938) pp. 75-76, 450; Law of Treaties (1961) p. 601; Schwarzenberger, International Law (1957) p. 177; see also Oppenheim, op. cit. (1955) where at p. 126 he emphatically states: "Through recognition only and exclusively a State becomes an International Person and a subject of International Law". On the declaratory view of recognition, see Lauterpacht, Recognition in International Law (1947) p. 38 et. seq.; Ti-Chiang Chen, The International Law of Recognition (ed. L.C. Green, 1951) p. 13 et. seq.

<sup>12</sup> Succession of States automatically raises the question of "(1) the identity of the State; (2) whether succession in fact has occurred; (3) the effect in either case of such changes as have taken place on the obligations and rights of the State or States involved". (Whiteman, Digest, Vol. 2, p. 754); "Without such effect there can be no succession in law". Lester, loc. cit., note 5 above at p. 476.





of transfer of sovereignty, or of supreme power, over a territory from the predecessor to the successor State creates legal consequences which affect the relations between the new State and third States. The legal problem of State succession, then, relates to whether, and to what extent, these changes affect a State's national and international rights and obligations. Theoretically, the question may be posed: Do a State's international rights and duties arising from treaties remain unaffected by a change of sovereignty and are automatically succeeded to, as a matter of law, by the new entity?

The emergence of the new States of Asia and Africa as full international persons since the end of the Second World War has raised the question whether there is automatic subrogation in respect of existing international treaties which were concluded on their behalf by the retiring imperial powers with third States. By subrogation, as used in this study, is meant the legal transfer of liabilities, or of rights and duties arising under treaties and other international agreements, as a consequence of the change of territorial sovereignty. Since the new States have arisen out of territories which were subjected to the sovereignty of the metropolitan powers, and since abrupt discontinuity of all treaty obligations contracted by the predecessor States might well lead to a legal vacuum and serious confusion, there has been a revival of interest, both in diplomatic circles and among scholars, in the problem of State suc-



cession. A writer<sup>13</sup> recently observed that the new States, on attainment of independence, are granted recognition by the older members of the international community in the expectation that they will, in their relations with other States, observe existing norms of customary international law. Attempts are being made at the reformulation of a new theory of the law of State succession which will reflect the current realities of the international situation, believing that the practice of the new States affords a relevant pattern which should point to the development of new juridical doctrines.<sup>14</sup> But, as there is no uniformity of State practice, there is a diversity of views among authorities as to what the "law of State succession" ought

---

<sup>13</sup> Krenz, "Newly Independent States and the Problem of State Succession", 33 Nordisk Tidsskrift for Internl. Ret Og Jus Gentium (1963) p. 97.

<sup>14</sup> The leading exponent of this position has been Prof. D.P. O'Connell in many of his works. See his two volumes on State Succession in Municipal Law and International Law (1967). Speaking earlier of the need for the automatic devolution of treaties in the interest of "order and international stability", he pleaded that "The category of heritable treaties must be extended beyond that of dispositive treaties, though clearly it comprises it" - "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 86; see also Kenneth J. Keith, "Succession to Bilateral Treaties by Seceding States", 61 A.J.I.L. (1967) p. 521 et. seq.; in respect of multilateral treaties, see C.W. Jenks, "State Succession in Respect of Law-making Treaties", 29 B.Y.I.L. (1952) p. 105; G.V. La Forest, "Towards a Reformulation of the Law of State Succession", Proceedings, A.S.I.L. (1966) p. 103.



to be.<sup>15</sup> The warning against hasty constructions of legal formulas purported to reflect the prevailing international law lies in the fact that "while State practice is one of the main

- 
- <sup>15</sup> As in the 18th and 19th centuries, controversy still remains between the "positivists", who favour a more general transmission of legal rights and duties, and the "negativists", who maintain either that international law does not recognize automatic novation, except in respect of customary international law which, nonetheless, remains autonomously binding upon all members of the international society, including the new States, or that subrogation is essentially a matter of policy, and hence a new State starts life with a clean slate.

Adherents of the former school of thought include Grotius, De jure belli ac pacis, ii, 9, SS. 12; Pufendorf, De jure naturae et gentium, VIII, 12, SS. 1-5, 7-9; Vattel, Le droit des gens ou principes de la loi naturelle, Vol. II, Ch. 12; Max Huber, Die Staaten - Succession (1898); and more recently, O'Connell, Kenneth J. Keith, and C. Wilfred Jenks. See n. 14 above for some of the literature cited there.

Those inclined to the negative view of State succession include A.B. Keith, Theory of State Succession (1907); Cavaglieri, "Effets juridiques des changements de souverainete territoriales", in Revue de droit international et de legislation comparee, Vol. 15 (1934) pp. 219-248; W.E. Hall, A Treatise on International Law (1924) pp. 114-115; A.S. Hershey, The Essentials of International Public Law and Organization (1927) pp. 216-28; and A.P. Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) pp. 481-503; see also C. Marek, Identity and Continuity in Pub. Int. Law (1968) pp. 14-24.

The majority of writers probably take an intermediate position, distinguishing between obligations which are locally connected to a State's territory and hence succeeded to ipso jure, and "non-localized" obligations which do not pass over to the new State. See Oppenheim, Int. Law (8th ed., 1955) pp. 158-59; McNair, The Law of Treaties (1961) p. 601; Wheaton, Elements of Int. Law (1866) pp. 33-37; Hyde, Int. Law, Chiefly as Interpreted and Applied by the United States (2nd rev. ed., 1945) Vol. 1, p. 358, and Vol. 2, p. 1539; Schwarzenberger, International Law, I, (1957) pp. 166, 174; Manual of Int. Law (5th ed., 1967) pp. 87-88; Brierly, The Law of Nations (6th ed., 1963) p. 152 et. seq.







sources of international law..., it is only after a reasonably uniform practice of considerable duration that rules of law crystallize out".<sup>16</sup>

The succession of States is juridically differentiated from the succession of governments.<sup>17</sup> International law is concerned with the former, not with the latter, for in spite of changes in governmental organization, or in the constitutional structure of a given State, the State remains the same subject of rights and duties under international law.<sup>18</sup> Nor does international law concern itself with the methods - legal or extra-constitutional - by which the government of a particular State comes into being. These are questions which fall with-

<sup>16</sup> McNair, op. cit. (1961) p. 591.

<sup>17</sup> Oppenheim, op. cit., p. 153; Schwarzenberger, A Manual of International Law (1967) p. 86; Max Sorensen (ed.) Manual of Public International Law (1968) p. 291; Hall, International Law (8th ed., 1924) p. 114; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 476 et. seq.; O'Connell has assumed the rather novel theoretical position of assimilating the succession of States with the succession of governments, arguing that a distinction between the two is artificial since the predecessor States in fact concluded treaties on behalf of their dependent territories merely as their constitutional agents, and hence continuity, not discontinuity, must be the rule. ("Independence and Problems of State Succession", in William V. O'Brien (ed.) The New Nations in International Law and Diplomacy (1965) p. 10 et. seq. For a criticism of the concept of "agency" see Lester, loc. cit., p. 488.

<sup>18</sup> Marek, op. cit., n. 6 above, p. 14; cf. the legal opinion of the Secretariat of the United Nations with reference to the partition of India in 1947, U.N. Doc. A/5209; A/CN.4/149; also U.N. Doc. A/C1/212, October 11, 1947 for the Opinion of the Legal Committee regarding future practice of the United Nations.



in the scope of municipal law, although a change of government by violent or revolutionary means might well induce the pursuit by that State of one kind of international policy rather than another.<sup>19</sup> Thus, from the point of view of State succession, it was contended by the new Soviet Government, after the Bolshevik revolution of 1917, that a fundamental change in the political system had taken place; consequently, it did not consider itself bound by the obligations of the former government. But, generally speaking, it is immaterial that a government has established itself in breach of the constitution; so long as it is in effective control over the territory and population, it remains bound by the acts of its predecessor. At least with regard to the perfunctory acts of administration, the capacities vested in the revolutionary regime differ slightly, if at all, from those vested in the de jure regime; the principal difference would appear to lie in respect of the extra-territorial operation of the acts of the rebel regime. It is, therefore, possible to maintain that acts perfunctorily done in the normal routine of governmental administration by a rebel regime are valid and binding upon the successor Government. This position was confirmed in the Tinoco Arbitration, 1923.<sup>20</sup> General Tinoco over-

---

<sup>19</sup> The repudiation by the new Soviet Government of the debts of the Czarist regime in 1918 is a case in point, although this would generally be in violation of international law, particularly where no measure of compensation is made. See, e.g., Oppenheim, op. cit., p. 154, n. 2.

<sup>20</sup> Tinoco Arbitration (1923), R.I.A.A., Vol. 1, p. 369; 18 A.J.I.L. (1924) p. 147.



threw the Government of Costa Rica in 1917 and established a new constitution. However, in 1919 his government fell and the old constitution was restored. The restored Government enacted legislation nullifying all contracts made by the executive during the revolutionary Tinoco regime and certain currency issues and decrees. Among those affected by this legislation were the Central Costa Rica Petroleum Company which had received an oil concession from Tinoco, and the Royal Bank of Canada which was creditor of Costa Rica in Costa Rican currency. As a consequence of the claims of these two companies, Great Britain, which had not recognized the Tinoco regime, submitted the matter to the arbitration of Chief Justice Taft, as the sole arbitrator.

Great Britain contended that the Tinoco Government was the only Government in Costa Rica when the liabilities were created, and that its acts could not therefore be repudiated. Costa Rica argued that the Tinoco Government was not a government in international law either de facto or de jure and that its acts were void in Costa Rican law. It further contended that since Great Britain had not recognized the regime, it was therefore estopped from pursuing its claims.

The arbitrator, however, held that as a question of fact the Tinoco Government was the government of Costa Rica. Recognition, while it might be declaratory of this fact, was not a precondition of it. The validity of the acts of that Government are to be assessed by reference to that Government's law and not that of its predecessor. In the opinion of the arbit-







rator, the concessionary contract remained binding on Costa Rica regardless of whether or not the revolutionary Government was recognized by Great Britain.

On the other hand, where the struggle for power leads to the control of different parts of the same country by the two contending factions, the faction which survives as the government will be responsible only for such acts of the other as are of an administrative, as distinct from a political, character; that is such acts as would normally be expected to occur in the routine, impersonal conduct of public administration. This principle was upheld in U.S. (George W. Hopkins claim) v. United Mexican States (1926).<sup>21</sup> In this case, the Huerta Revolutionary Government of Mexico, which the United States did not recognize, had sold postal money orders to Hopkins, a citizen of the United States. The successor Government in Mexico refused to honour the postal orders. Nevertheless, the Commissioners, drawing a distinction between acts of "impersonal" ordinary administration and acts of "personal" extraordinary character performed by unrecognized governments, refused to entertain the view that the issue of the money orders was an act personal to the revolutionary regime, and hence not binding upon the State of Mexico. On the contrary, they held that the issue of the money orders, though by "a local de facto government", constituted an impersonal

---

<sup>21</sup> U.S. (George W. Hopkins) v. United Mexican States (1926) R.I.A.A., Vol. 4, p. 41; 21 A.J.I.L. (1927) p. 160.



act of administration attributable to the State; consequently, it was binding upon Mexico.

It should, perhaps, be pointed out that the succession of a legitimate government to a suppressed rebel government may possess features, under certain circumstances, more akin to a succession of States than that of Governments.<sup>22</sup> But the degree to which it may be willing to assume the obligations or liabilities of the suppressed regime may well depend upon the extent of authority exercised by the revolutionary group, and the nature of the obligations incurred. If, on the other hand, the rebel group succeeds in establishing itself as the de jure government, "the personality of the rebel body merges, upon its ultimate success, with that of the State which it comes to represent".<sup>23</sup> It would seem that the situation would be governed by the applicable principles of succession of governments. It is generally agreed, however, that in so far as the personal or strictly political acts of the old regime are concerned, the new Government remains free from the rights and obligations flowing from them. But, in the last analysis, it is, of course, within the discretion of the successful government to grant recognition as it may please to the personal acts of the ousted government.

---

<sup>22</sup> Chen, The International Law of Recognition (ed., L.C. Green, 1951) p. 326.

<sup>23</sup> Ibid., p. 327; Silvanie, "Responsibility of States for Acts of Insurgent Governments, 33 A.J.I.L. (1939) pp. 77-90.



Military occupation of a foreign State poses a somewhat different problem. In international law, military occupation involves no transfer of sovereignty, but the military occupant acquires certain rights and becomes subject to certain duties. Quite naturally, the initial reaction of a restored sovereign might be to regard all the acts, in his absence, of the aggressor as null and void. Nevertheless, it is open to him, if he so wishes, to recognize the continued validity of the law of the military occupant, although he may not, should he be inclined to treat such acts as invalid, consider "as acts of treason actions taken by the inhabitants of the territory in compliance with regulations properly issued by the occupant".<sup>24</sup> But, in so far as property acquired by the military occupant, or by a local puppet government set up by the occupant, in a foreign country is concerned, it would appear that such property can be recovered by the restored Government by virtue of its right as the successor of the occupant, or of the puppet regime. Thus, during the Second World War, when the Japanese conquered the Philippines, they set up a puppet regime under their protectorate in 1944. During the puppet regime, a building owned by a Japanese citizen was sold by him to the puppet government for use as an Embassy in Japan. However, on the liberation of the Philippines by the

---

<sup>24</sup> Green, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity", 4 Canadian Ybk. International Law (1966) p. 5. See also S.K. Das, Japanese Occupation and Ex Post Facto Legislation in Malaya (Singapore, 1959) C5.





United States forces, the restored Philippine Commonwealth Government was re-invested with governmental authority. The present Philippine Government in 1951 claimed title to the property as successor to the puppet regime.<sup>25</sup>

As regards succession to treaties in the event of a change of government, the general position appears to have been expressed in the Convention on Treaties adopted in 1928 at the Sixth International Conference of American States held at Havana. It provided that "treaties shall continue in effect even though the internal constitution of the contracting States has been modified" and that "if the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions".<sup>26</sup> Similarly, Article 24 of the Harvard Research Draft Convention on the Law of Treaties<sup>27</sup> stipulated that "unless otherwise provided in the treaty itself, the obligations of a State under a treaty are not affected by any change in its governmental organization or its constitutional system".

Again, this principle was more emphatically embodied in the 1959 draft code on the Law of Treaties prepared by the

---

<sup>25</sup> Whiteman, Digest, Vol. 2, p. 769.

<sup>26</sup> Article 11 of the text of the convention, Hudson, International Legislation, Vol. 4, pp. 2378-2385.

<sup>27</sup> 29 A.J.I.L. (1935) Suppl., p. 662.



International Law Commission. It states:

(1) The rights and obligations provided for in the treaty attach to the parties to it as States, irrespective of the particular form or method of its conclusion. The Government or administration of the State for the time being, irrespective of the character of its origin, or of whether it came into power before or after the conclusion of the treaty, acts as the agent of a State to carry the treaty out, or to claim rights and benefits under it, as the case may be, and is bound or entitled accordingly.

(2) In consequence, the treaty obligation, once assumed by or on behalf of the State, is not affected, in respect of its international validity or operative force, by any of the following circumstances:

(a) That there has been a change of government or regime in any State party to the treaty...<sup>28</sup>

The above position would seem to follow from the general principle that changes of a constitutional - or for that matter of an unconstitutional - character do not affect the international personality or the legal identity of the State.

Since the question of succession in international law turns, in the ultimate analysis, upon the international identity of the State, a distinction is made between "universal" succession and "partial" succession, based upon the extent to which the legal personality of the State is affected.<sup>29</sup> Succession is said to be "total" or "universal" where change of sovereignty results in the complete extinction of the international personality of the State. Thus the State not only loses its

---

<sup>28</sup> Article 6, Ch. II, I.L.C. Yearbook, Vol. 2, 1959, p. 43.

<sup>29</sup> W.E. Hall, International Law (8th ed., 1924) p. 114; McNair, Law of Treaties (1961) p. 590.



international identity, but its legal order is rendered ineffective.<sup>30</sup> In that case - i.e., of "universal" succession - there cannot be a transmission to the successor State of political rights and obligations under international treaties, except such as may be acquired by devolution.<sup>31</sup> As indicated earlier, political treaties are in any event regarded as binding only as between the parties. But rights and duties of a local character are considered generally transmissible.<sup>32</sup>

"Partial" succession is a consequence of territorial changes, whether by accretion or reduction of territory. While such changes may have legal effects, they do not, as a rule, affect the legal identity of the State,<sup>33</sup> for they must at least "leave a part of the territory which can be recognized as an essential portion of the old State".<sup>34</sup> If the international personality of the State is not completely destroyed, then the predecessor State will continue to bear its international rights and obligations, except in so far as those rights and duties may be modified by such territorial mutations as have occurred. Thus, under partial succession, treaties

---

<sup>30</sup> Marek, Identity and Continuity of States in Public International Law (1968) pp. 4-9.

<sup>31</sup> O'Connell, International Law, Vol. 1 (1965) p. 424.

<sup>32</sup> McNair, Law of Treaties (1961) p. 601; O'Connell, The Law of State Succession (1956) p. 15.

<sup>33</sup> O'Connell, Ibid.; Kunz, The Changing Law of Nations (1968) pp. 285-294.

<sup>34</sup> Whiteman, Digest, Vol. 2, p. 759.





creating localized obligations are believed to pass to the successor State, but the State itself is under no obligation to abide by treaties of a political nature.<sup>35</sup>

The absence, however, of a general rule of State succession in international law has given rise to competing schools of doctrinal thought. It is, perhaps, apposite to examine briefly the general theoretical position of the law of State succession in order that the current attitudes of the new States may fruitfully be assessed against it.

## 2. The Theories of State Succession

It is a well established principle of international law that a new State is bound by the existing rules of customary international law.<sup>36</sup> Thus, initially its rights and obligations will be derived exclusively from customary international law.<sup>37</sup> Beyond this, there is little agreement either in theory or in practice<sup>38</sup> as to the extent to which a new State may

---

<sup>35</sup> Charles de Visscher, Theory and Reality in Public International Law (rev. ed., 1968) pp. 179-180.

<sup>36</sup> Oppenheim, op. cit., I, (1955) p. 18; Jenks, loc. cit., n. 14 above at p. 107; Sorensen, loc. cit., n. 17 above, p. 295.

<sup>37</sup> Whiteman, II Digest (1963) p. 754.

<sup>38</sup> "...a scrutiny of the practice of States after the Napoleonic Wars and since 1914 shows convincingly that no new general international rule... has been developed; there is neither an established clear usage, nor the opinio necessitatis. States have acted, and do act, in such cases less according to legal considerations than according to... 'the amorphous principles of politics'". Kunz, loc. cit., n. 33 above, p. 294.



succeed to the rights and duties of its predecessor, or indeed whether the predecessor's obligations are succeeded to ipso jure. Theoretical propositions regarding State succession have, in specific historical periods, been enormously influenced by prevailing political philosophies and the attitudes of governments.<sup>39</sup>

During the nineteenth century the stage was dominated by the theory of universal succession which maintained that all treaties of the predecessor State devolve upon the successor. There is little doubt that this theory was motivated by the constant changes of boundaries in Europe as a result of wars, or independence movements.<sup>40</sup> Continental writers, such as de Martens, remained the leading exponents of the universal succession theory. They based their appeal upon the Roman law notion of succession upon death (hereditas jacens), which the classical writers - Grotius,<sup>41</sup> Pufendorf,<sup>42</sup> and de Vattel<sup>43</sup> - had already imported into international law. Their basic thesis was that all treaties of the predecessor State devolve

---

<sup>39</sup> O'Connell, "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 84.

<sup>40</sup> E.g., The Napoleonic Wars; the Unification of Germany; the Unification of Italy; Disintegration of the Ottoman Empire; the Independence of Greece.

<sup>41</sup> De Jure Belli ac Pacis, bk II, Chs. 9, 10 (Carnegie Classics of Int. Law Trans. 1925).

<sup>42</sup> De Jure Naturae et Gentium, bk II, Ch. 9, Sec. 6 (Carnegie Classic of Int. Law Trans. 1934).

<sup>43</sup> Le Droit des Gens, bk II, Ch. 12, (Carnegie Classics of Int. Law Trans. 1916).



by virtue of the continuity of the legal personality of the extinguished State. This implied that the legal personality of the State could never be completely destroyed, since it was the crucial element of the estate itself. All the legal rights and obligations attaching to the estate were then regarded as incidental to this personality, and hence must pass ipso jure.<sup>44</sup> Since the personality of the State was immutable, irrespective of changes in the identity of its agents, neither revolution nor cession of territory, it was believed, could affect the fundamental character - the basic constancy - of that personality. Rights and obligations flowing from it were identified with "absolute natural rights" and as such were in themselves constant.<sup>45</sup> Acts, however, of a ruler in his personal or private capacity lapse upon his death or expulsion. On the other hand, those acts committed by him in his public capacity, i.e., acts which are impersonal in character and are related directly to the realm, remain binding upon his successor.

This classic view of State succession which probably reached its apogee in the second half of the nineteenth century,<sup>46</sup> reflected the overriding concern with the protection

---

<sup>44</sup> O'Connell, State Succession in Municipal Law and International Law, I, (1967) p. 9.

<sup>45</sup> Ibid.

<sup>46</sup> See, e.g., F. de Martens, Traite de droit international, Vol. 1, (1883) p. 368 et. seq.; Max Huber, Die Staaten-Succession (1898) p. 61 et. seq.





of private (particularly acquired) rights. The effect of this doctrine, though far-reaching in municipal law,<sup>47</sup> remained somewhat limited in international law. In any event, under the turbulent political conditions of this period in Europe, during which the characteristic form of succession was that resulting either from annexation or cession of territory, the debate focused on whether or not a conqueror should succeed to the debts of the subjugated territory.<sup>48</sup>

Max Huber,<sup>49</sup> who probably was the most influential advocate of the universal succession theory during the second half of the nineteenth century, based his analysis upon sociological grounds, and maintained that in the case of a State coming into existence by secession or separation from the parent State, it remained bound by all treaties of the parent State, including commercial and capitulation treaties. The only exceptions were treaty obligations of an explicitly political character, such as alliances and guarantees. He further adopted the radical position that, in principle, treaty obligations subsist even in cases of conquests.

---

<sup>47</sup> As regards the problem of State succession in general, Professor O'Connell confesses that an "analysis of the matter discloses that international law plays a very restricted role in the matter except with respect to treaties, international claims and protection of foreign investment" - State Succession in Municipal Law and International Law, I, (1967) p. vii.

<sup>48</sup> See, e.g., E.H. Feilchenfeld, Public Debts and State Succession (1931) p. 35 et. seq.

<sup>49</sup> Huber, op. cit., pp. 136-154; Jenks, loc. cit., p. 113; O'Connell, Ibid., pp. 9-13.



Nevertheless, it is interesting to note that as a Judge of the Permanent Court of International Justice, Huber's judicial attitude did not quite bear out his theoretical views with respect to the binding character of treaty obligations. He seemed to recognize that the requirements of a State's safety and security as well as the general welfare of its population may render it impossible for it to fulfil any treaty obligation she may have incurred. For it is generally agreed that it is within the discretion of the State to adopt, whenever its safety and security are threatened, such extraordinary measures (including the violation of treaty provisions) as are deemed essential to avert the danger. Thus in the Wimbledon case (1923) both Judges Huber and Anzilotti in their joint dissenting opinion made the following reservation regarding Germany's obligation under the Treaty of Versailles with regard to the international status of the Kiel Canal:

The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these



stipulations do not conflict with such an interpretation.<sup>50</sup>

The development of the negativist theory of State succession represented a reaction against the universal succession theory. Arthur B. Keith in his Theory of State Succession with Special Reference to English and Colonial Law, published in 1907, posited the thesis that no treaties are inherited by a conqueror or cessionary State, but that all the latter's treaties are extended over the conquered or ceded territory.<sup>51</sup> He argued that all available evidence was against succession, except in cases involving treaties of navigation and railways which are usually succeeded to tacitly or informally through exchange of notes because they are of advantage to the parties concerned. But it should be noted that, writing as an Imperial lawyer, Keith's theoretical position appeared to be largely

---

<sup>50</sup> The Wimbledon. P.C.I.J. (1923) Dissenting Opinion by Anzilotti and Huber, Ser. A, No. 1, p. 37.

As regards the element of mutuality as the basis of binding treaty obligations between States, the Franco-Venezuelan Mixed Claims Commission (1902) stated: "A treaty is a solemn compact between nations.... To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters..." Maninat case (1905), Jackson H. Ralston and W.T.S. Doyle: Report of French-Venezuelan Mixed Claims Commission of 1902, Washington, 1906, p. 44 at p. 73.

This statement illustrates the enormity of the problem which the theory of universal succession may pose to the successor State.

<sup>51</sup> Keith, The Theory of State Succession (1907) pp. 17-20.





influenced by the official views of the British Government.<sup>52</sup> On the other hand, Arrigo Cavaglieri<sup>53</sup> acknowledged that successor States have often accepted the treaty obligations of the predecessor States, but maintained that such succession was purely voluntary and based "on grounds of equity, convenience, or political interest".<sup>54</sup> He saw such voluntary acceptance as creating a new legal relationship between the successor State and the third party,<sup>55</sup> which may possess the same content but its legal character may be different from that of the extinguished State. A.S. Hershey<sup>56</sup> and Charles G. Fenwick<sup>57</sup> also appear inclined to the view that there is no

---

<sup>52</sup> See, e.g., the Law Officers' Opinion of February 11, 1901, on the fate of South African Treaties after Britain's annexation of the South African Republic in 1900. F.O. Confidential Paper (7763) No. 30; also the judgment in West Rand Central Gold Mining Co. v. The King (1905) 2 K.B. 391.

<sup>53</sup> Cavaglieri, "Effets juridiques des changements de souverainete territoriales", Revue de droit international et de legislation comparee, Vol. 15 (1934) pp. 219-248.

<sup>54</sup> Ibid., p. 224.

<sup>55</sup> Ibid., p. 225.

Earlier, in 1929 he asserted in reference to a conquering State that since it possesses sovereign power and unfettered independence, there is no rule of law which obliges it to assume the legal consequences of the acts of its predecessor. "Regles generales du droit de la paix", 26 Hague Recueil (1929), p. 378; see also his report in 36 Annuaire de l'Institut de droit international (1931) pp. 191-194.

<sup>56</sup> A.S. Hershey, The Essentials of International Public Law and Organization (1927) pp. 216-228.

<sup>57</sup> Charles G. Fenwick, International Law (1965) pp. 173-175.



obligatory rule of law which requires the successor State to take upon itself the juridical consequences of the acts of the predecessor State.

The two extreme positions exemplified by the positivists and the negativists do not reflect the views of the majority of writers on the subject. Nor do they present a strictly accurate picture of the practice of States. While, on the one hand, the existence in international law of the notion of automatic and absolute subrogation has not been acknowledged, it is, on the other hand, generally accepted that certain treaty obligations may well devolve upon the successor State.<sup>58</sup> There is, however, no agreement as regards the criteria of devolution. The traditional position of the law, it would appear, has been expressed by McNair as follows:

...newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations, save in so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State.<sup>59</sup>

---

<sup>58</sup> Hackworth, Digest, Vol. 1, pp. 540 et. seq., II, p. 174, et. seq.; Udina, "La succession des états quant aux obligations internationales autres que le dettes publiques", 44 Hague Recueil (1933) pp. 665, 697, 755-56; Mervyn Jones, loc. cit., n. 5 above, p. 374; de Visscher, op. cit., n. 29 above, p. 179; Schwarzenberger, I International Law (1957) p. 166; Oppenheim, I International Law (1955) p. 158 et. seq.

<sup>59</sup> McNair, The Law of Treaties (1961) p. 601.



As long ago as 1892, Kiatibian<sup>60</sup> and Lariviere<sup>61</sup> had admitted succession in respect of some categories of treaty obligations. But while Kiatibian maintained that only localized treaties and debts survive, Lariviere argued that in order to consider any treaty to have survived, it is essential first to determine the objective of the treaty in question since the nature and effect of different treaties cannot be the same. He held that those treaties whose purpose could no longer be fulfilled must be considered to have lapsed; substitution was possible only where the objective of the treaty could be fulfilled by the successor State. In this sense, obligations flowing from multilateral instruments survive, since, in Lariviere's view, they are possessed of the "character of general utility". For Udina, the localization of the treaty was essential to its survival.<sup>62</sup>

On the other hand, Herbert A. Wilkinson,<sup>63</sup> basing his formulation upon the practice of the United States, postulated succession to treaty obligations solely upon the capacity of the State undergoing change of sovereignty to fulfil

---

<sup>60</sup> Kiatibian, Consequences juridiques des transformations territoriales des Etats sur les traites (1892) cited in Jenks, op. cit., 29 B.Y.I.L. (1952) p. 111

<sup>61</sup> Lariviere, Des consequences des transformations territoriales des Etats sur les traites anterieu res (1892) (cited in Jenks, Ibid.).

<sup>62</sup> Udina, op. cit., n. 49 above, p. 665 et. seq.

<sup>63</sup> Wilkinson, The American Doctrine of State Succession (1934) pp. 115-124.





such obligations. Asserting that the burdens must go with the benefits, the principle seeks to base succession upon proof that the people or the territory had actually benefited from the application of the treaty in question.<sup>64</sup> A further distinction is made by Wilkinson between "political" and "civil" treaties. While the former is subject to abrogation by the successor State, the latter, which comprise conventions of a commercial, legal, or economic character, are heritable. S.B. Crandall also agrees that "a State formed by separation from another, whether the personality of the original State still exists or is completely lost by disintegration, succeeds to such treaty burdens of the parent State as are permanent and attached to the territory embraced in the new State..."<sup>65</sup>

There is a further division of opinion to be found among Latin American jurists on the principle of State succession. On the one hand, some writers, including Antokoletz,<sup>66</sup> Accioly,<sup>67</sup> Ursua,<sup>68</sup> Costa<sup>69</sup> and Sierra,<sup>70</sup> hold that a new

---

<sup>64</sup> Ibid., p. 123.

<sup>65</sup> Crandall, Treaties: Their Making and Enforcement (2nd ed., 1916) p. 434.

<sup>66</sup> Antokoletz, Tratado de Derecho internacional publico, Vol. 1, (1928) para. 195.

<sup>67</sup> H. Accioly, Direito internacional publico, Vol. 1, (1st ed., 1933) paras. 244 and 245.

<sup>68</sup> Ursua, Derecho internacional publico (1938) p. 274.

<sup>69</sup> Podesta Cost, Manual de Derecho internacional publico (1947) paras. 52-53.

<sup>70</sup> Sierra, Tratado de Derecho internacional publico (1947) p. 126.



State starts life with a clean slate, and remains completely free from any obligations under treaties concluded by its predecessor. On the other hand, a small group of jurists<sup>71</sup> accept that succession is necessary in certain cases, particularly with reference to multilateral conventions of an administrative, economic and social nature. Here again, Latin American attitude to the law of State succession can be explained less on the basis of juristic propositions than in terms of the general political and economic history of that region.<sup>72</sup>

---

<sup>71</sup> Bello, Principios de derecho internacional (1933); Calvo, Le Droit international theorique et Pratique, Vol. 1 (5th ed., 1896); Bustamante, Derecho internacional publico, Vol. III (1936).

<sup>72</sup> Cf. Soviet attitude towards succession problem. There seems to be no agreement even among Soviet writers on the question. F.I. Kozhevnikov, for instance, maintains that the October Revolution created no new subject of international law and that Russia and the Soviet Union are one and the same person in international law. On the contrary, Professor Krylov takes the view that there is no general succession when a State of one historical type takes the place of a State of another type. Thus, the Soviet State, as distinct from the Russian Empire, is qualitatively a new subject of international law. This latter view confirms the official Soviet position at the Genoa Economic Conference held in April, 1922. Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic", 50 A.J.I.L. (1956) pp. 611-615; see also Harvard Research Draft Convention on the Law of Treaties, 29 A.J.I.L. (1935), Supplement, p. 1052; Oliver J. Lissitzyn, "Recent Soviet Literature on International Law", 11 American Slavic and East European Review (1952) p. 268.

The current Soviet position, in view of its status as a world power, seems to have been modified. While still admitting that "the question of the cessation or continuance of treaty obligations for a new State is a matter of its sovereign rights", it maintains that "the treaties of the former State continue to be binding (continued on p. 132)



### 3. Contemporary Trends in State Succession Theory

Lack of consensus on the legal rules of subrogation during the nineteenth and the first half of the twentieth centuries has not deterred contemporary legal scholars from attempting to formulate a general principle of State succession. Professor O'Connell in his monumental works,<sup>73</sup> takes the more or less categorical view that "succession rather than non-succession should be the rule".<sup>74</sup> Basing his contention on "the localization of treaties by specific act" and "the autonomous administrative character of the territories that makes for legal continuity upon independence", he argues that neither the traditional distinction between "personal" and "dispositive" treaties, nor that between State succession and govern-

---

72 (continued)

on a State of a new historical type only in cases when, firstly, the new State makes an official statement to this effect and, secondly, if there is no explicit statement regarding non-recognition or annulment of the treaty (tacit affirmation)" - (International Law: A Textbook for Use in Law Schools, published under the auspices of the Academy of Sciences of the U.S.S.R., Institute of Law and State, Moscow (1961) p. 126).

73 See, for example, State Succession in Municipal Law and International Law, 2 Vols. (1967), which has, to a very large extent, superseded his The Law of State Succession (1956); "Independence and Succession to Treaties", 38 B.Y.I.L. (1962); "State Succession and Problems of Treaty Interpretation", 58 A.J.I.L. (1964); "Independence and Problems of State Succession", in William V. O'Brien (ed.), The New Nations in International Law and Diplomacy (1965) pp. 7-41.

74 "Independence and Problems of State Succession", Ibid., pp. 21, 25; "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) pp. 85-86.







mental succession is any longer relevant under contemporary conditions. C. Wilfred Jenks, in an impassioned article with reference to multilateral treaties, criticizes "the rationale of the rule that treaty obligations do not pass to a successor State" as having "no application to obligations under multipartite instruments of a legislative character".<sup>75</sup> On the other hand, he recognizes that "the extent to which treaty obligations are binding upon successor States... involves complex and in some respects controversial questions".<sup>76</sup> But, although he admits that the law of State succession is still "fluid", and that "the whole problem must constantly be envisaged in the broadest political perspective in such a manner as to ensure that the psychology of newly-acquired independence and respect for generally accepted law are reconciled on a basis which contributes to the long-term integration of an effective international community..."<sup>77</sup> he rejects the

---

<sup>75</sup> Jenks, "State Succession in Respect of Law Making Treaties", 29 B.Y.I.L. (1952) p. 142; The Common Law of Mankind (1958) pp. 93-96.

<sup>76</sup> The Common Law of Mankind (1958) p. 94.

<sup>77</sup> "State Succession in Respect of Law-Making Treaties", loc. cit., n. 75 above, p. 144.



clean slate rule and pleads that "law-making" treaties<sup>78</sup> be regarded as surviving changes of sovereignty.

Daniel Marchand<sup>79</sup> and S.K. Agrawala<sup>80</sup> point to the growing need for succession by new States to multilateral conventions of a humanitarian character. On the other hand, Kenneth J. Keith,<sup>81</sup> writing on "succession to bilateral treaties by seceding States", reaches the conclusion that the positive practice of the new States with respect to bilateral treaties provides evidence of the existence of opinio juris, and hence "a general rule of law" regarding the succession of new States to bilateral treaties. He contends that "this succession is required, in many instances, by customary international law".<sup>82</sup> Significantly, the great majority of

<sup>78</sup> Professor O'Connell doubts the propriety of the concept of a "legislative" or "law-making" treaty as a basis of heritability and maintains that "the description of a multilateral treaty as 'legislative' serves a useful purpose in explaining the processes of law-making on a large-scale, but it is misleading as a touchstone of transmissibility". "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 132.

<sup>79</sup> "State Succession and Protection of Human Rights", 8 Journal of the Int. Commission of Jurists, (Summer, 1967) pp. 36-51.

<sup>80</sup> "State Succession and Protection of Human Rights", in Singhvi (ed.), Horizons of Freedom (New Delhi, 1969) pp. 135-160.

<sup>81</sup> "Succession to Bilateral Treaties by Seceding States", 61 A.J.I.L. (1967) pp. 521-546.

<sup>82</sup> Ibid., pp. 522, 545.



the treaties cited as continuing to affect the new States after independence are of the character of commercial, administrative and humanitarian treaties, which, in any event, are often regarded by new States, for convenience, as continuing in force. Indeed, as early as 1953, Professor L.C. Green,<sup>83</sup> in an important study showed that there is, for all practical purposes, a judicial tendency to secure some degree of continuity as far as commercial and extradition treaties are concerned. Shigejiro Tabata<sup>84</sup> sees as one of the reasons for continuing to regard itself as bound by the treaty obligations of its predecessor, the new State's desire to avoid inconvenience and the creation of a complete legal vacuum. He suggests that this positive step is normally initially taken to gain time for a detailed study of the treaties involved, and to act as the necessity arises "to amend their terms in order that they may better serve the new situation".<sup>85</sup> It could then be inferred that, from the point of view of the new State, the time factor as well as the requirement of effective international intercourse, consti-

---

<sup>83</sup> "Recent Practice in the Law of Extradition", 6 Current Legal Problems (1953) pp. 291-296; see also his "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity", 4 Canadian Yb. I. Law (1966) p. 3.

<sup>84</sup> Tabata, "The Independence of Singapore and Her Succession to the Agreement Between Japan and Malaysia for Air Services", 12 Japanese Ann. Intern'l Law (1968) p. 37.

<sup>85</sup> Ibid.





tutes an important element in policy decisions, upon independence, in respect of devolution of treaties. The position in customary international law is clear, since it is generally agreed that a new member of the international community is bound by existing norms of customary international law. The fundamental question is whether there is a legal duty upon a new State to succeed to the treaty rights and obligations of its predecessor, besides those which are generally held to have acquired the force of custom, or those of a "localized" character. Furthermore, if the current position of the new States with regard to commercial and other technical treaties is regarded as evidence of the existence of "a general rule of law" respecting subrogation, can the new States be presumed to regard themselves as acting in conformity with existing legal obligations when they acknowledge themselves to be bound by those treaties concluded on their behalf by the metropolitan State which was responsible for their international relations?

Neither the reaction of the new States to the continuing theoretical debate, nor the extant writings of publicists would provide a justification for asserting that there is "a general rule of law" requiring a new State to succeed to



the treaty obligations of the predecessor.<sup>86</sup> Again, no current judicial or arbitral authority supports the contention that there is a general principle of international law, besides the customary rules, which makes automatic subrogation obligatory upon a new State.<sup>87</sup> A writer<sup>88</sup> has, in a recent essay, pointed out the immense practical difficulties confronting the new States when it comes to a choice between the inheritance of their predecessors' treaty obligations through devolution agreements and the repudiation of such obligations. These often arise from their lack of both the opportunity and the requisite resources - material and technical - to study and compile the relevant treaties covered by the devolution agreements. Recognizing that the norms of

---

<sup>86</sup> Succession to technical and humanitarian multilateral treaties, as indicated above, has been almost universally accepted by the new States. Besides customary law rules and "localized" treaties, there seems to be some agreement regarding succession where there has been a degree of continuity of State identity. The argument based on estoppel would probably apply, and the principle res transit cum suo onere would appear to have validity in cases of "dispositive" treaties. But it is hard to see how these in themselves could furnish a basis for positing a general theory favouring automatic succession to treaties, whether of customary or of conventional origin.

<sup>87</sup> Schwarzenberger, International Law, Vol. 1 (1957) p. 179; A Manual of Int. Law (5th ed., 1967) p. 88.

<sup>88</sup> Hugh J. Lawford, "The Practice concerning Treaty Succession in the Commonwealth", 5 Canadian Yearbook of Int. Law (1967) pp. 3-13, see particularly pp. 4-5 for the views of (a) the new Commonwealth countries, and (b) the British Government concerning its practice in transmitting treaty obligations to a new State



international law are comparatively flexible, the problems raised by treaty law itself complex and unresolved; and that the ultimate test of the cogency of a given international legal rule is by reference to the actual conduct or the policy considerations of a specific State or group of States, it would appear that no useful purpose will be served by a purely pedantic search for rigid rules purported to reflect the lex lata.

It has been vigorously contended by a small group of writers<sup>89</sup> that "a new State starts life with a clean slate so far as the treaties of its parent State are concerned".<sup>90</sup> This negative view of treaty devolution in its revived form has been mostly asserted against automatic inheritance of bilateral treaty obligations. Seeing the treaty as primarily a contract, they argue that it is binding only between the parties. Thus, Castren writes that:

When a State is dismembered into new independent States, its treaties as a rule become null and void without descending to the new State. Treaties are generally personal in so far as they presuppose, in addition to the territory, also the existence of a certain sovereign over the territory. To the succeeding States, the treaties concluded by the former State are res inter alios acta.<sup>91</sup>

---

<sup>89</sup> See, e.g., McNair, op. cit., p. 601; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963); S. Prakash Sinha, New Nations and the Law of Nations (1967) pp. 69-79.

<sup>90</sup> Lester, loc. cit., p. 488.

<sup>91</sup> Castren, "Obligations of States arising from the Dismemberment of Another State", 13 Zaory (1951) p. 754.





On the other hand, Lester, thrusting the emphasis upon the international identity of the States holds that:

A State may be dismembered so that some of its parts acquire a degree of international identity, but so long as the original State preserves its identity, treaties to which it was party will continue to be binding.<sup>92</sup>

This might be considered a little too extreme a position, and probably merits Jenks criticism of the negativist school as "juristically faulty and historically inaccurate". Yet, there are some inclined to this school of thought who have insisted that intention or the shared expectation of the parties is necessary for succession to the treaty to be automatic.<sup>93</sup> An appeal to the intentions, or the reasonably imputed expectations of the parties to an instrument as a criterion of succession is necessarily an appeal to the rules

<sup>92</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 481; Marek, op. cit., pp. 23-25; Oppenheim, op. cit., Vol. 1 (1955) p. 925.

<sup>93</sup> Lester, Ibid., p. 490; "I understand the expression "Unless the treaty otherwise provides", as used in the draft, to mean that succession to a treaty can take place only to the extent compatible with the intentions of the parties to the treaty. It does not mean that a pre-existing treaty can in itself impose unqualified succession to it on a newly independent State". (Emphasis supplied). Separate comment by Professor Oliver J. Lissitzyn, Interim Report and Draft Resolutions of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, (International Law Association Conference, Buenos Aires, 1968) pp. 12-13.

"It is not possible to consider the proposed rules as the statement of the international law in force (lex lata) but only as directives proposed de lege ferenda...." Dr. Jaroslav Zourek, Czechoslovak delegate, Ibid., p. 13.



of treaty interpretation. O'Connell has warned about the dangers inherent in this approach. First, there is the likelihood that succession, in many instances, would not occur, and new States would be tempted to place excessive reliance upon "the operation of the rebus sic stantibus doctrine"<sup>94</sup> as a means of repudiating treaties viewed as intolerably burdensome, on the pretext that, with change of sovereignty, the disappearance of the basic foundation upon which the treaties rested had occurred. Thus, he observes that

A treaty with elaborate machinery for performance by the predecessor state is not, as a pure matter of construction, susceptible of performance by its successor. One does not need a law of state succession at all in order to arrive at the conclusion that most treaties do not devolve upon successor states, for this, clearly, is a conclusion yielded by the ordinary law of treaties that looks to the effective fulfilment of the parties' intentions - intentions ordinarily frustrated by a change of sovereignty.<sup>95</sup>

On the other hand, the desirability of securing succession to treaty obligations by new States does not and cannot diminish the significance of the factor of the parties' intentions in determining what categories of treaties survive change of sovereignty. It is a basic canon of treaty law that

---

<sup>94</sup> "Independence and Problems of State Succession", in William V. O'Brien (ed.) The New Nations in Int. Law and Diplomacy, (1965) p. 14.

<sup>95</sup> Ibid. Earlier, O'Connell had conceded that "the effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation". The Law of State Succession (1956) p. 15. His present position reflects a drastic modification of this view.



for the obligations stipulated in an instrument to be performed, the parties must be able to discharge the obligations; to do this, the shared intentions, expectations and objectives of the parties must at least be ascertainable. Thus the problem of the legal effect of changes of circumstances - or of sovereignty - on treaty relations cannot be completely divorced from one of determining the intentions of the contracting parties, and this is essentially a problem of interpretation.<sup>96</sup>

"Once such an intention has been ascertained, it is for international law to give or to deny effect to it".<sup>97</sup> It is still an open question whether the new States fully comprehend the extent of the treaty obligations of their predecessor States to which they are asked to succeed. This apparent lack of full knowledge of the range and nature of treaties entered into on their behalf by the metropolitan States led Professor Lawford, the Canadian Member of the International Law Association Committee on State succession, to remark that

---

<sup>96</sup> McNair, The Law of Treaties (1961) pp. 436-457, 511-513, 662-664, 681-691; Brierly, The Law of Nations (6th ed. by Waldock, 1963) pp. 336-338; Harvard Research in Int. Law: Law of Treaties, 29 A.J.I.L., Suppl. 635 (1935) pp. 1097-1124; C.C. Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. 2 (2nd rev. ed., 1945) p. 1524; Schwarzenberger, International Law, I, (1957) p. 543; Briggs, The Law of Nations (2nd ed., 1952) pp. 917-918; Gordon, "The World Court and the Interpretation of Constitutive Treaties", 59 A.J.I.L. (1965) p. 794; see also "The Special Problems of Interpretation", Restatement of the Foreign Relations Law of the United States (Am. Law Institute, 1965) p. 467, Section 153.

<sup>97</sup> Lester, op. cit., p. 490.







"much of the pressure for a 'clear slate' doctrine concerning succession to treaty obligations arises from the inability of the newer States to be certain of the scope of the potential obligations involved.... A new State cannot and should not be bound by an obligation of which it has not been notified or cannot otherwise know".<sup>98</sup>

The foregoing analysis at least illustrates the absence of common understanding even among jurists of established international stature with respect to the formulation of acceptable juristic criteria for State succession to international treaties and conventions. Thus, the State Succession Committee of the International Law Association, which met at Buenos Aires in 1968 to discuss the problem again revealed wide divergence of scholarly views on what should be the applicable rules of law with regard to the transfer of treaty rights and duties to the new States on attainment of independence. Similar absence of consensus had featured the two previous conventions of 1'Institut de Droit International held in 1932 at Osio and in 1934 at Paris, where the problem of succession to treaties was debated in relation to the subject "Effets juridiques des changements de souverainete territoriales".<sup>99</sup> Speaking of the "dispositive"

---

<sup>98</sup> Special Comment by Professor Hugh J. Lawford, Interim Report and Draft Resolution of the Committee on State Succession (I.L.A. Conference, Buenos Aires, 1968) p. 12; see also his article in 5 Canadian Yb of Int. Law (1967) pp. 3-13.

<sup>99</sup> See Cavaglieri (Rapporteur) in Annuaire de l'Institut de Droit International, Session de Paris, Vol. 34 (1934).



treaties, which are held by the current proponents of the universal succession theory to be liable to automatic devolution, Professor O'Connell, the Rapporteur of the International Law Association State Succession Committee, records that "the Committee rejected the category of dispositive treaties,"<sup>100</sup> and does not concede that there is a category of treaties which are succeeded to in virtue of international law and irrespective of the intentions or actions of the respective States".<sup>101</sup>

In view of the obvious lack of unanimity of views on the part of legal scholars as to the formulation of a general rule of law respecting the succession of new States to the treaty obligations of their predecessors, what guidelines, it may be asked, does the United Nations, as a world body in which the new States play an active part, offer on the theoretical status of the law of State succession? For the moment, a discussion of the succession of international institutions, as entities with some legal capacity under international law, is outside the scope of this specific enquiry. However, both the problem of the admission of new States to the membership

---

<sup>100</sup> In 1965, the Committee on State Succession of the I.L.A. defined dispositive treaties as treaties which "are in the nature of objective territorial regimes created in the interests of one nation or the community of nations; are applied locally in virtue of territorial application clauses, (and) touch or concern a particular area of land" - The Effect of Independence on Treaties, International Law Association (1965) p. 352.

<sup>101</sup> Op. cit., n. 98 above, p. 10.



of the United Nations and that Organization's commitment to "the progressive development of international law and its codification" have involved the United Nations in the taking of decisions relating to the effect of change of sovereignty upon treaty obligations.

The United Nations was first confronted with a decision on State succession in 1947 as a result of territorial and constitutional changes in India, which was a foundation member of the Organization. India had been governed as British India under the Government of India Act, 1935.<sup>102</sup> But with the passage of the Indian Independence Act in 1947,<sup>103</sup> its territory was split into two, one part retaining the original name of India and the other calling itself Pakistan. Thus, a transfer of sovereignty took place.<sup>104</sup> The question arose as to whether Pakistan should be regarded as having succeeded to the rights and obligations of a member under the Charter, or whether it should be regarded as an entirely new State, having come into existence with the enactment of the Indian Independence Act, 1947. Pakistan was of the opinion that it

---

<sup>102</sup> 26 Geo. V, C. 2.

<sup>103</sup> 10 and 11 Geo. VI, C. 30.

<sup>104</sup> Ibid., Sections 1, 6, 7, 18; For a discussion of the evolution of India as an International Person and the question of succession to treaties see Sethi, "India in the Community of Nations", 14 Canadian Bar Review (1936) p. 39; Sen, "The Partition of India and Succession in International Law", 1 Indian Law Review (1947) p. 190.





should be treated on a footing of equality with India in so far as membership in the U.N. was concerned. That is to say, Pakistan regarded itself as an original member of the Organization on the grounds that, having been a part of India prior to the 15th August, 1947, when they agreed to form themselves into two separate sovereign States, "it was, in effect, under the latter name, a signatory to the Treaty of Versailles and an original member of the League of Nations", and having "as a part of India, participated in the San Francisco Conference in 1945... (it) became a signatory to the United Nations Charter".<sup>105</sup> It is this view of Pakistan as a foundation member of the United Nations and hence a "co-successor" to British India which prompted the new Pakistani Government, in a cable to the Secretary General on August 15, 1947, to urge that both India and Pakistan be considered automatic members of the United Nations with effect from that date.<sup>106</sup>

The legal opinion,<sup>107</sup> however, offered by the Assistant Secretary-General in charge of the Legal Department of the Secretariat, was that the partition of India was not a case of dismemberment, but that part of the existing State had broken off and formed a new State, with the original State

---

<sup>105</sup> GAOR, 2nd sess., 92nd Mtg., p. 317.

<sup>106</sup> S.C.O.R., 2nd Yr., No. 78, 186th Mtg., p. 2027 et. seq.

<sup>107</sup> U.N. Press Release PM/473, 12th August, 1947; see also GAOR, 17th sess., suppl. No. 9, para. 72; U.N. Doc. A/5209; A/CN.4/149, p. 2.



retaining its international personality. Consequently, the old State retains all rights and duties under existing treaties, including those conferring membership on international organizations. He added that the constitutional changes which had taken place in no way affected India's treaty commitments. Following this, the First Committee of the General Assembly recommended that Pakistan be admitted to the Organization as a new member. In the ensuing debate, certain members of the General Assembly raised objections to the legal opinion of the Secretariat and maintained that either both India and Pakistan should be regarded as inheriting membership, or both should apply for admission as new States.<sup>108</sup> The issue was then referred to the Sixth (Legal) Committee for clarification of the legal position on State succession which should act as a basis for dealing with similar cases in future, although this would in no way alter the decision of the First Committee on the present case. In compliance, after a lengthy discussion, the Sixth Committee declared that

(1) As a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or frontier has been subjected to changes, and that the extinction of the State as a legal personality recognized

---

<sup>108</sup> France in the Security Council and Argentina in the General Assembly supported Pakistan's argument, but the Polish Delegate insisted that the Security Council should retain the prerogative of making recommendations for admission of new members (SCOR, 2nd Yr., No. 78, pp. 2027, 2052; SCOR, 2nd Yr., No. 81, 190th Mtg., p. 2141; GAOR, 2nd sess., First Comm., p. 519).



in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

(2) When a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless, it has been formally admitted as such in conformity with the provisions of the Charter.<sup>109</sup>

There is much that can be said about the Legal Committee's statement of the legal rules governing State succession. But two things are clear about it. First, it rejects the idea of automatic succession to treaties. Secondly, it emphasizes that membership in an international organization can be secured only in conformity with the rules of its constituent instrument. It is not here intended to go into an analysis of the substantive merits of the decision of the United Nations to admit to membership only Pakistan as a new State, rather than India and Pakistan as new States, both having come into existence as separate States on the same day under the terms of the Indian Independence Act, 1947. Nor is a discussion of the legal effects of the devolution agreements between India and Pakistan - the Indian Independence (International Arrangements) Order, 1947<sup>110</sup> - relevant at this

---

<sup>109</sup> U.N. Doc. A/5209; A/CN.4/149, p. 2; see generally, Oppenheim I (1955) pp. 167-168.

<sup>110</sup> U.N. Doc. A/C.6/161; GAOR 2nd sess., 6th Committee, pp. 308-310.







juncture,<sup>111</sup> since these will be dealt with in greater detail in a subsequent chapter. What is significant within the context of the general theory of State succession in particular is the view adopted by the United Nations itself regarding the applicable rules of international law with respect to the succession of new States to treaty rights and obligations.

The theoretical problem was not resolved with the above "declaration of principles" by the Legal Committee of the General Assembly. Granted that this view reflects the traditional state of the law,<sup>112</sup> and that at the time of its declaration, the massive proliferation of new States, within so short a period of time, in Asia and Africa could not be foreseen, the concern of the new States to modify or alter certain traditional rules of international law which are

---

<sup>111</sup> For critical comments on these points see Schachter, "The Development of International Law Through the Legal Opinions of the United Nations Secretariat", 25 B.Y.I.L. (1948) pp. 103-109; Liang, "Admission of Indian States to the United Nations", 43 A.J.I.L. (1949) pp. 143-145; Aufricht, "State Succession Under the Law and Practice of the International Monetary Fund", 11 I.C.L.Q. (1962) pp. 154-155; Green, "The Dissolution of States and Membership of the United Nations", 32 Saskatchewan Law Review (1967) pp. 103-106.

<sup>112</sup> Of the legal view of the U.N., O'Connell says: "The real problem was functional, not logical, and the solution depended upon analysis of the Charter and the implications of membership, and not upon deduction from a generalized and abstract principle, which was at best insecurely established. For the opinion to be used now to prove that a new State succeeds to no treaties of its predecessor is to reverse the argument and compound the fallacy", 2 State Succession in Municipal Law and International Law (1967) p. 185.



"inimical" to their interests has spilled over into the realm of treaty law and revived the somewhat sensitive and knotty problem of State succession itself.

Since its first session in 1949, the question of "Succession of States and Governments" has been high on the agenda of the International Law Commission of the United Nations,<sup>113</sup> even though the Commission did not start serious work on the subject until its fourteenth session held in 1962. Under the terms of General Assembly Resolution 1686 (XVI) of December 18, 1961<sup>114</sup> the Commission was requested to include "on its priority list the topic of Succession of States and Governments" in view of its future work in the field of the codification and progressive development of international law. At its fourteenth session, the Commission set up the Sub-Committee on the Succession of States and Governments and vested it with the function of developing "the scope of the subject, the method of approach for a study and the means of providing the necessary documentation".<sup>115</sup>

The Sub-Committee on Succession of States and Governments

---

<sup>113</sup> GAOR, 4th sess., suppl. No. 10 (A/925); Yearbook of the International Law Commission, 1949, p. 279; see also the Secretary-General's Memorandum, "Survey of Intl. Law in Relation to the Work of Codification of the Int. Law Commission", (Doc. A/CN.4/1/Rev. 1).

<sup>114</sup> GAOR, 17th sess., suppl. No. 9 (A/5209) para. 60; 2 Yearbook I.L. Commission (1962) p. 190.

<sup>115</sup> GAOR, 17th sess., Suppl. 9 (A/5209) para. 54; 2 Yearbook I.L.C. (1962) p. 189.



was scheduled, after two previous private meetings, to hold its first public meeting at Geneva in January, 1963. By its resolution 1765 (XVII) of November 20, 1962, the General Assembly specifically recommended that the Commission should "continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments with appropriate reference to the views of States which have achieved independence since the Second World War".<sup>116</sup> Pursuant to its mandate, the Sub-Committee met at Geneva from 17 to 25 January, 1963 and again on 6 June, 1963, at the beginning of the International Law Commission's fifteenth session. On the conclusion of its study, the Sub-Committee submitted a report to the International Law Commission, which was included in the Commission's report to the General Assembly.<sup>117</sup> The Sub-Committee's report contains the conclusions<sup>118</sup> reached, and its recommendations on the approach which the Commission should adopt in its study of the problem. In endorsing the Committee's report the Commission stated that the succession of Governments would, for the time being, be considered "only

---

<sup>116</sup> GAOR, 23rd sess., suppl. No. 9 (A/7209/Rev. 1) para. 32 (Emphasis supplied).

<sup>117</sup> U.N. Doc. A/CN.4/160; GAOR, 18th sess., suppl. No. 9 (A/5509) Annex II; 2 Yearbook of Int. Law Commission 1963, p. 260.

<sup>118</sup> Ibid., pp. 224-225.







to the extent necessary to supplement the study on State succession".<sup>119</sup> Several members again emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new States". It was also decided that the work of the Commission in respect of succession, States to treaties should be guided and supplemented by the series of studies<sup>120</sup> conducted and published by the Secretariat itself.

It would appear that these preliminaries were calculated to create a basis for the achievement of a modicum of consensus among a large number of the United Nations Member States with respect to the substance of the law of State succession. The participation of the new States in the process of developing and codifying modern international law has given added emphasis to the importance of achieving some range of agreements on the general principles of State succession.

When, however, at its twentieth session, the Commission

---

<sup>119</sup> In view of the assimilation by Professor O'Connell of State succession and succession of Governments, it is interesting to note the emphasis on the distinction between the two in the Commission's approach to the problem; see also GAOR, 23rd sess., suppl. No. 9 (A/7209/Rev. 1) p. 30.

<sup>120</sup> See, e.g., a memorandum on the succession of States in relation to Membership in the U.N. (A/CN.4/149 and Add 1); memorandum on succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); "Digest of the Decisions of International Tribunals relating to State Succession" (A/CN.4/151); five studies on the Succession of States to Multilateral Treaties (A/CN.4/200 and Corr. 1 and Add. 1 and 2); "Material on Succession of States" in United Nations Legislative Series (ST/LEG/SER.B/14).



came to debate the first report on "Succession of States in respect of rights and duties resulting from sources other than treaties",<sup>121</sup> submitted by Mohammed Bedjaoui of Algeria, the Special Rapporteur on that aspect of the topic, there was widespread disagreement over definition of terms. This was followed by a consideration of the first report by Sir Humphrey Waldock, Special Rapporteur, on succession in respect of treaties.<sup>122</sup> As regards the definition of "State succession", while admitting that the formulation of a comprehensive definition was largely an academic matter, the Commission, nonetheless, came to the conclusion that "the term 'succession' would meanwhile continue to be used".<sup>123</sup> Earlier, in its discussion in reference to succession of States, the Commission emphasized the close correlation between the extinction of the international personality of a State and the termination of treaties.<sup>124</sup> A year later, in 1964, the Commission dealt with the territorial scope of treaties and their effects on third States in relation to the succession problem. Again, common agreement was not easy to come by. Thus, in the introduction to the final draft on the law of

---

<sup>121</sup> A/CN.4/204.

<sup>122</sup> A/CN.4/202.

<sup>123</sup> GAOR, 22nd sess., suppl. No. 9 (A/6709/Rev. 1).

<sup>124</sup> GAOR, 19th sess., suppl. No. 9 (A/5809) para. 18; 2 Yearbook of the Int. Law Commission, 1964, p. 175.



treaties adopted in 1966, the Commission states that "the draft articles do not contain provisions concerning the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or concerning the effect of the extinction of the international personality of a State upon the termination of treaties".<sup>125</sup>

Article 69 of the final draft articles on the law of treaties expresses the following reservation on this matter: "The provisions of the present articles are without prejudice to any questions that may arise in regard to a treaty from succession of States or from the international responsibility of a State".<sup>126</sup> Commenting on the above reservation, the Commission said: "Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of state responsibility".<sup>127</sup> But as we have

---

<sup>125</sup> GAOR, 21st session, suppl. No. 9 (A/6309/Rev. 1), part II, para. 30 of the report and para. 6 of the commentary on Art. 58 of the draft; 2 Yearbook of the Int. L.C., 1966, pp. 177 and 256.

<sup>126</sup> Art. 69 of the draft, Ibid.

<sup>127</sup> Ibid., commentary on Art. 69; see also 61 A.J.I.L. (1967) p. 450.





seen in the previous chapter, the attempt of the International Law Commission at the "codification" of the law of State responsibility revealed the profound anxiety of the new States regarding the existing law of State responsibility.<sup>128</sup> They are sensitive to this area of the law because they believe the rules operate against their interests. If there is an area of international law that the new States are anxious to "reform", surely it is that of State responsibility. In refuting the validity of some of the existing principles of State responsibility they have often invoked the consensual theory of international law, arguing that since they took no part in the formation of such rules, they do not reflect the free consent of the new States and hence could not be held as binding upon them. The law of State succession is marked again by similar conflict of interests and friction of views between the older, developed States and the new, underdeveloped countries. The new States, conscious of their economic backwardness and desirous of accelerating the development of their resources for their own welfare, are, in principle, reluctant to subscribe to a general theory of State succession which might indiscriminately encumber them with the treaty obligations of their predecessors. Whether this theoretical attitude accords with their actual behaviour with respect to

---

<sup>128</sup> See, e.g., Yearbook of I.L.C., Vol. 1, 1957, pp. 155, 157; Castaneda, "The Underdeveloped Nations and the Dev. Int. Law", 15 Int. Org. (1961).



the devolution of the treaty obligations of their former rulers is another question. But as in other contexts, the actual practice of the new States, as distinct from theoretical argument, must be viewed only in relation to the inexorable facts of their economic and political conditions. In so far as the evolution of general principles of the law of State succession in conformity to the specific character of the contemporary international society is concerned, it is submitted that an additional and important reason for the hesitancy of the International Law Commission in laying down definitive rules of subrogation is to be found in the very uncertainty and 'fluid' character of the law of State succession itself, compounded by the obsessive desire of States to be guided by the requirements of policy.

The attitude of the new States to treaties is, perhaps, illustrated by the views expressed by some during the debate in 1966 on the Commission's draft Convention on the law of treaties:

the Commission would still have to delete from the draft some excessively traditionalist elements and, taking the idea of justice as a foundation, should endeavour to formulate the final draft articles with an eye to the future.... The draft articles on the law of treaties could not acknowledge unjust, unfair, or unequal treaties, which in many cases were the consequence of the colonial system. Instruments imposed without the consent of the populations concerned, instruments which were the price of accession to independence, instruments taking advantage of the situation of the developing countries... could not be protected by the law of treaties and should



be eliminated from international relations.<sup>129</sup>

The above quotation again makes reference to the concepts of justice and unequal treaties, two concepts taken most seriously by the new States, and which could be regarded as an index of the general reaction of these States to basic problems of international and treaty law. The allusion to the consensual basis of binding instruments, as well as to "instruments which were the price of accession to independence" must, it is submitted, be seen as a portrayal of the actual feeling of the new States regarding even those treaties which they have inherited by devolution. It is possibly an indication, with changes in their economic and political fortunes, of their potential policy action with respect to those treaties. To illustrate further the problems posed to the declaration of a general theory of universal and automatic succession,<sup>130</sup> it is perhaps appropriate to refer to the latest report of the International Law Commission to the General Assembly on the succession of States in respect of treaties. It said, inter alia:

Some members also drew attention to the difference in nature between decolonization and other cases of succession. They said that decolonization may bring a radical change in the social structure of new States and not

---

<sup>129</sup> 20 International Organization, pp. 563-64 (1966), cited in Green, "New States, Regionalism and International Law", 5 Canadian Yb. Int. Law (1967) p. 133 (Emphasis added).

<sup>130</sup> See, e.g., O'Connell, op. cit., note 74 above; Keith, op. cit., note 81 above; in reference to multilateral treaties see, Jenks, 29 B.Y.I.L. (1952) p. 105.







merely a formal change of sovereignty. Its political, economic and social objectives are not the same as those of traditional succession. Conditions are not the same in the successor State and in the predecessor State. It was also pointed out that succession resulting from decolonization involves not only the transfer of sovereignty from one State to another, but sometimes also the return of an earlier sovereignty. All this affects the permanence of the acts performed by the predecessor State, so that the elements of rupture tend to carry more weight than those of continuity.<sup>131</sup>

It is clear from the above citation that the theoretical posture of the new States on the law of State succession inclines towards "discontinuity". It is suggested that this is basically a negativist view. It is contrary to the proposition that "succession must be the rule". The argument that "decolonization may bring a radical change in the social structure of new States and not merely a formal change of sovereignty" seems to imply that the new States are prone to view their achievement of sovereignty in revolutionary terms, despite the fact that in most cases it took the evolutionary process of transfer of power. In the same vein, Professor Eugene A. Korovin in defence of the earlier Soviet attitude to succession was to argue that:

Every international agreement is the expression of the established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle, pacta sunt servanda, must be scrupulously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the State, for the purpose of reorganization not only of economic ties but the governing principles of internal and

---

<sup>131</sup> GAOR, 23rd sess., suppl. No. 9 (A/720 9/Rev. 1) para. 63.



external politics, the old agreements, in so far as they reflect the pre-existing order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other.<sup>132</sup>

Perhaps the new States have not exactly formulated their views in reference to some dogmatic theory of class relations. But their approach to the problem of colonial relations is similarly dominated by the notion of inequality, and treaties contracted under colonial regimes tend to be interpreted either as remnants of unequal relations, or as intended to perpetuate the economic and political servitude of the new States. In so far as the devolution treaties are concerned, these are res inter alios acta as far as third parties are concerned.<sup>133</sup> It is not possible, therefore, to regard them as a basis for inferring the existence of a rule of general subrogation to treaty rights and obligations. In connection with these, the report of the International Law Commission<sup>134</sup>

---

<sup>132</sup> Eugene A. Korovin, "Soviet Treaties and International Law", 22 A.J.I.L. (1928) p. 763.

<sup>133</sup> E. Lauterpacht, "State Succession and Agreements for the Inheritance of Treaties", 7 I.C.L.Q. (1958) pp. 525-26; McNair, Law of Treaties (1961) p. 653; Green, 32 Saskatchewan Law Review (July, 1967) p. 104; Lester, 12 I.C.L.Q. (1963) p. 503; Higgins, The Development of International Through the Political Organs of the United Nations (1963) p. 322; Castren, loc. cit., note 91 above.

<sup>134</sup> GAOR, 23rd sess., suppl. No. 9 (A/7209/Rev. 1) p. 28, para. 70.



stated that "it will be necessary to consider whether the consent of the former colonies to these treaties was an expression of their free will or the price paid for their emancipation". This, probably, demonstrates the existence of some misgivings on the part of the new States themselves as to the legal validity of some of the inheritance agreements, particularly if they were "imposed" by the departing metropolitan authority.

It is true that in the case of multilateral conventions of which the Secretary-General of the United Nations is the depositary, extensive practice indicates that the transfer of obligations is often secured through some routine administrative procedure. Thus, by this means, the new States have increasingly considered themselves bound by multilateral instruments of a social, economic or technical nature. Yet, even in this case, the International Law Commission, in dealing with the succession of States in respect of treaties, was compelled to take note of the new States' insistence upon the element of consent as the basis of binding obligations. Thus, it was stressed that "the need for an element of consent was not inconsistent with the concept of 'succession'. But the case would be one of succession to a right to be a party to the treaty not of a direct succession to the rights and obligations of the treaty".<sup>135</sup>

---

<sup>135</sup> Ibid., p. 30, para. 88.







Of all the new States, probably the only ones that have explicitly opted for the "clean slate" policy are Algeria,<sup>136</sup> Upper Volta<sup>137</sup> and Israel.<sup>138</sup> A few others - Tanzania,<sup>139</sup> Uganda<sup>140</sup> and Kenya<sup>141</sup> - have adopted a temporizing policy whereby, after a certain period of time, all treaties not confirmed as continuing in force must be deemed to have lapsed. Although Israel has argued that "on the basis of generally recognized principles of international law, Israel, which was a new international personality, was not automatically bound by the treaties to which Palestine had been a Party",<sup>142</sup> it appears willing to respect certain types of treaty rights and if possible re-negotiate such treaties with a view to adapting them to the new conditions.<sup>143</sup> In fact, it has been contended that in a sense Israel is a successor

---

<sup>136</sup> GAOR, 17th Sess., 6th Cttee., 742nd Mtg., p. 40, para. 14.

<sup>137</sup> I.L.C. Yearbook, Vol. 2, 1962, p. 119, para. 111.

<sup>138</sup> U.N. Doc. A/CN.4/19; I.L.C. Yearbook, Vol. 2, 1950, pp. 206-218; ST/LEG/SER.B/14, pp. 39-53.

<sup>139</sup> I.L.C. Yearbook, Vol. 2, 1962, p. 121, para. 127.

<sup>140</sup> Whiteman, Digest, Vol. 2, p. 1001; I.L.A. Handbook (1965) p. 386.

<sup>141</sup> I.L.A. Handbook (1965) p. 387.

<sup>142</sup> I.L.C. Yearbook, Vol. 2, 1950, p. 206.

<sup>143</sup> ST/LEG/SER.B/14, p. 44.



to Palestine.<sup>144</sup> On the other hand, Algeria, after its achievement of independence by revolutionary struggle, tended to regard all treaties as political, and hence did not consider itself bound by any previous French treaties. Upper Volta based its non-succession policy upon the fact of its sovereign independence. Yet it would be inaccurate to conclude that these States have in practice achieved a complete rupture of continuity. When Israel became independent, there was some degree of succession even in municipal law to avoid a complete legal vacuum.<sup>145</sup> Algeria, despite its theoretical objection to succession, has in actuality acceded to a number of conventions administered by the United Nations, which were ratified by France.<sup>146</sup> Upper Volta acknowledged succession to the Geneva Convention of 1949 and to about

---

<sup>144</sup> See, e.g., Green, "Legal Issues of the Eichmann Trial", 37 Tulane L.R. (1963) p. 670; "The Maxim Nullum Crimen Sine Lege and the Eichmann Trial", 38 B.Y.I.L. (1962) p. 457 at p. 465.

<sup>145</sup> Dr. S. Rosenne has written: "The municipal law previously in force within the territory will remain in force therein after a change of sovereignty, whether that change takes place as a result of cession or as a consequence of emancipation. The legal consequences of that common practice are that the law takes effect as though it were the municipal law of the new sovereign. He is presumed, in the absence of express enactment, to have enacted it as his own", "The Effect of Change of Sovereignty upon Municipal Law", 27 B.Y.I.L. (1950) p. 280.

<sup>146</sup> I.L.O. Official Bulletin, Vol. XL, p. 262; see Algerian delegate's statement in GAOR, 17th sess., 6th Cmttee., 742nd Mtg., para. 14.



thirteen I.L.O. conventions.<sup>147</sup> The great majority of the new States have succeeded to one type of international convention or another. But the practice of these States regarding continuity or discontinuity of treaty obligations is so inconsistent as to suggest no coherent and self-evident criteria other than considerations of political and economic interests.

In 1933, Mr. de Valera, Prime Minister of the Irish Free State, stated what may be regarded as the classic view of a new State in connection with subrogation to treaties:

the present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international law practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require.<sup>148</sup>

Although this statement was prompted by the alleged operation of the inter se doctrine in British constitutional law, it is generally agreed that, in so far as subrogation is concerned, this is substantially the correct position in international law.<sup>149</sup> Yet it has been argued that, "because evident moral

---

<sup>147</sup> U.N. Doc. A/CN.4/150, p. 38.

<sup>148</sup> Dail Eireann, Parliamentary Debate, Vol. XLVIII, Col. 2058, in part as cited by McNair, The Law of Treaties (1961) p. 641.

<sup>149</sup> Ibid.





and sociological pressures emphasize the need for continuity and the avoidance of disruption" and because of "positive manifestation of the need for order and stability",<sup>150</sup> juristic theory calls for the postulation of automatic ("universal") succession. Furthermore, O'Connell rejects an essentially political solution to the problem of succession to treaties on the ground that this would offend "juristic logic".<sup>151</sup> But there seems to be no jurisprudential basis, grounded upon the practice of States, for constructing a theory of universal or automatic succession. The function of theory in any intellectual enterprise is not merely to give some order and coherence to phenomena, but also to aid the observation and description of such phenomena. To this extent, a theoretical formulation must be empirically relevant. Any juridical doctrine which advocates either automatic, "universal" succession or total non-succession is necessarily monolithic and seeks to minimise or ignore the factual elements of politics which influence the behaviour of States in

---

<sup>150</sup> Further reasons favouring automatic succession are "the localization of treaties by specific acts, the autonomous administrative character of the territories..., the dubious validity of the thesis of "personal" and "dispositive" treaties...; and the virtual irrelevance of the distinction, save in form, between State succession and government succession". O'Connell in New Nations in Int. Law (1965) p. 25. For a critique of this see Lester, 12 I.C.L.Q. (1963) pp. 490-491; For the legal effect of territorial application clauses in treaties, see Shabtai Rosenne, "United Nations Treaty Practice", 86 Hague Recueil (1954) p. 376-378.

<sup>151</sup> O'Connell, The New Nations in Int. Law (1965) p. 25.



their international relations. Treaties are succeeded to because it is economically and administratively desirable and, what is more, politically convenient to do so. There is sufficient historical precedent to show that these have remained the overriding factors in most cases of State succession. It is, therefore, not possible to maintain that, under international law, with the possible exception of treaties which have acquired the force of custom, or of an essentially "dispositive" character, succession of States to treaty rights and obligations derives from some iron-law of juristic logic, rather than from political or economic considerations.

#### 4. Conclusion

From the above study, it would seem that the crisis in the theory of State succession is no more resolved today than it was in the eighteenth, nineteenth and even the first half of the twentieth centuries. In terms of the practice of the new States in respect of multilateral treaties, there is an evident trend in favour of accepting the rights and duties flowing from such treaties since most of them are obviously of an economic, social or technical nature. But the overall practice of the various States is anomalous and inconsistent. Even in cases where devolution agreements had been signed between the former imperial power and the successor State, there has been some doubt, after independence, as to the binding character of the agreements. The series of debates in the





International Law Commission disclosed the difficulty of achieving consensus (with the concurrence of the new States) on a general theory of State Succession. All this renders the postulation of a monolithic theory of State succession a hazardous enterprise. Perhaps the best position so far, which is descriptive of the contemporary situation, and furnishes a basis for a flexible and potentially fruitful theory of State succession has been advanced by Mme. Bastid:

In principle, the State being an organized form of communal life, conforming to the specific conception of those who direct the affairs of the State in the light of the characteristics of the organised population, any cession of territory or any succession of public authority entails a change in the political order, a break in that order. Thus a successor State must, in principle, be completely free in the exercise of its functions; this implies that it must have full authority to dissociate itself from the previous behaviour of the State which had exercised territorial competence.

It must be borne in mind, however, that the material bases of the State - territory, population - subsist, and necessarily impose a certain degree of continuity. Moreover, a complete upset in legal relations would lead to an inadmissible state of confusion, irrespective of whether the rights had been acquired from the predecessor State (concession) or whether they had arisen in the relations between private individuals.

An additional point is that States are at present bound by many collective treaties. The successor State will find itself induced to maintain a general system accepted by the predecessor State and which had been applicable to its territory.

This is particularly the case where the aim of the collective treaties is not so much to regulate political relations between States as to ensure the protection of individuals who are about to pass from one sovereignty to another.

Thus we find quite a number of considerations which tend to favour a degree of continuity when one State replaces





another in any given territory.<sup>152</sup>

It is clear, therefore, that a very small number of new States, if any, claim, in principle, complete emancipation from the treaty obligations of the predecessor State. On the other hand, complete or "universal" succession does not exist in international law.<sup>153</sup> When a new State comes into being, there is a measure of succession to the rights and obligations of its predecessor, but the practice discloses the predominance of many non-legal factors. This suggests a pragmatic attitude, which makes it possible to distinguish between types of treaties considered heritable and those not so heritable, based upon their intentions, expectations and objectives.

---

<sup>152</sup> Mme. P. Bastid, "Cours de droit international public", in Les Cours de droit (1965-1966) pp. 561 et. seq., as cited by Daniel Marchand, 8 Journal of the Int. Comm. of Jurists (Summer, 1967) pp. 38-39.

<sup>153</sup> Oppenheim (1955) p. 158; Schwarzenberger, I, International Law (1957) pp. 166, 174, 179; Green, 5 Canadian Yearbook of Int. Law (1967) p. 134; Krenz, op. cit., n. 13 above, pp. 97 et. seq.



## CHAPTER III

### SUCCESSION TO TREATIES IN NEW STATES

#### 1. Succession in Commonwealth Countries

For our present purpose it is useful to divide the Commonwealth countries into two categories according to the circumstances under which they achieved international recognition as subjects of international law. The older Dominions of Canada, Australia, New Zealand, Irish Free State and South Africa acquired international identity through a gradual process of constitutional transition from Crown colony systems to responsible governments. It was not, however, until the late nineteenth century that they were endowed, as a matter of Imperial Constitutional law, with some treaty-making competence, for prior to 1880 all treaties concluded by Great Britain were liable to automatic application to all her colonies.<sup>1</sup> Thereafter, the right of participation in the negotiation and conclusion of commercial treaties was extended to the colonies.<sup>2</sup> The desire to maintain the diplomatic unity of the Commonwealth in matters relating to the declaration of war and peace, or recognition of foreign governments, and more particularly, the existence of the juristic notion of the in-

---

<sup>1</sup> R.B. Stewart, Treaty Relations of the British Commonwealth (1939) pp. 133 et. seq.

<sup>2</sup> D.P. O'Connell, "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 92.



divisibility of the British Crown made it necessary for the British Government to retain control over the conclusion of political treaties even after the Dominions had been granted the right to enter into independent commercial and technical treaties with foreign countries. But by the end of the First World War this position had been somewhat modified, for the Treaty of Versailles listed separate representatives, although under the overall rubric of the British Empire, for the Dominions of Canada, Australia, New Zealand, South Africa and India.<sup>3</sup> Thus, these States took part in the negotiation and signature of the Peace Treaties and, even though a part of the British Empire, were regarded as the original members of the League of Nations.

The Imperial Conference of 1926 acknowledged the autonomy of the "Self-governing Dominions" by declaring them to be "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations".<sup>4</sup> The Statute of Westminster of 1931, a legislative act of the United Kingdom Parliament, conferred upon the legislative organs of the

---

<sup>3</sup> Stewart, op. cit., p. 368; McNair, The Law of Treaties (1961) pp. 113-114.

<sup>4</sup> Imperial Conference, 1926, Summary of Proceedings. Report of Inter-Imperial Relations Committee, Cmd. 2768 (1926) p. 14.





Dominions full competence, thereby exempting them from the jurisdiction of the Imperial Parliament in London. This meant that the Dominions could now have, if they desired it, independent treaty-making faculty in international law. It is to be noted, however, that the Statute, being an act of the United Kingdom Parliament, only had domestic effect, and could not automatically confer this power upon the Dominion. Nevertheless, the concept of the Crown as one and indivisible and the fact that under the British Constitutional system, treaty-making is essentially an executive function implies not only that the United Kingdom must retain some measure of initiative in the sphere of "Commonwealth" foreign policy, but also that by its signature on a treaty, the United Kingdom could well commit some or all of the Commonwealth countries internationally. The treaty-making power hitherto acquired by the Dominions was in respect of bilateral treaties of a commercial and technical nature. The Imperial Conference of 1937, therefore, recognized, with reference to multilateral treaties, in view of the effect of the participation of members parties, that each member of the Commonwealth should take part in any such treaties as an individual entity, and that, in the absence of express provisions in the instruments to the contrary, each was in no way responsible for the obligations undertaken by another member, but each retained



the right of accession.<sup>5</sup> It is to be noticed that the typical form of international agreements concluded in the name of the colonies was the inter-governmental or inter-departmental form. Many of the postal conventions concluded by the colonial representatives, or with the consent of the local colonial administration, were of this form,<sup>6</sup> and, it should be added, the signatory in each case was usually the appropriate postal authority.

Although the political evolution which the older Dominions had undergone was thought to be merely of internal constitutional significance as within the British Empire,<sup>7</sup> the enhancement of political autonomy which resulted in securing plenary control over the conduct of their external relations had an important effect in international law. The gradual acquisition of treaty-making competence implied the power to enter into agreements with other sovereign States.

---

<sup>5</sup> Imperial Conference, 1937, Ollivier, Colonial and Imperial Conferences, Vol. 3, Part II, p. 427.

<sup>6</sup> E.g., The agreements between the United States and New South Wales (1874) and Queensland (1876), Hertslet, Commercial Treaties, Vol. 14, p. 1234, and Vol. 15, p. 460 respectively; in 1890, New Zealand separately signed the convention establishing the Union for the Publication of Customs Tariffs (now the Int. Convention for the Simplification of Customs Formalities, acceded to by N.Z. in 1924). For subsequent practice see, e.g., Barbados (1922) L.N.T.S., Vol. 20, p. 415; Federated Malay States (1921), L.N.T.S., Vol. 23, p. 209.

<sup>7</sup> See, e.g., Moore, "The Dominions and Treaties", 8 J. Comp. Leg. & Int. Law (1926) pp. 21-32; Johnston, "Dominion Status in Int. Law", 21 A.J.I.L. (1927) pp. 480-484; Thorson, "The British Commonwealth of Nations", 7 Canadian Bar Review (1929) pp. 95-100; Phillips, "The Dominions and the United Kingdom", 4 Camb. L.J. (1932) p. 164 et. seq.



The recognition of this capacity by other States, as manifested by their willingness to enter into treaty relations with the Dominions, entailed a recognition of their international identity, of their legal personality, for it is this fact of recognition in international law which establishes and makes concrete the international legal identity of a State as a subject of international law.<sup>8</sup> Thus the Dominions were in fact acting as independent sovereign States in international law. Their treaty-making capacity developed through four specific stages: the substitution of the right of separate adherence for the practice of automatic inclusion by the United Kingdom; the right of separate withdrawal from treaties granted at the Colonial Conference of 1907;<sup>9</sup> the right of withdrawal from treaties binding by "inheritance", and finally the right of separate negotiation and signature.<sup>10</sup> It would appear that this last phase of constitutional development did, in essence, confer upon the Dominions international capacity

---

<sup>8</sup> Scott, "The End of Dominion Status", 38 A.J.I.L. (1944) pp. 34-47; Corbett, "The Status of the Br. Commonwealth in Intl. Law", 3 U. of T. Law J. (1940) pp. 348-354; Dunn, "The New International Status of the Br. Dominions", 13 Va.L.R. (1927) pp. 354-373.

<sup>9</sup> Parliamentary Papers, Vol. 55, p. 483.

<sup>10</sup> Cf. Canadian Government's negotiation of a treaty with the U.S. in 1922 in regard to the Halibut Fisheries. Its right of separate negotiation was questioned by the U.K. Government, which believed that full powers should be given to His Majesty's Ambassador in Washington, together with the Canadian representative, to conclude the treaty. Canada hesitated on the ground that the treaty was of interest solely to Canada and the U.S., whereupon the U.K. agreed.





in so far as the independent assumption of international obligations under treaties was concerned.

India<sup>11</sup> and the Irish Free State<sup>12</sup> may well be assimilated with the older Dominions in view of their gradual development of independent treaty-making powers. British India had a limited measure of independent action as regards accession to and withdrawal from commercial treaties even prior to 1919. But unlike the Dominions, India had a representative, as distinguished from a responsible, government, for all governmental powers were concentrated in the hands of the Governor-General-in-Council, who, in turn, was directly responsible to the Secretary of State for India in London. For this reason, India could not, in realistic terms, be said to have reached a status of autonomy similar to that of the older Dominions, nor was she really in a position to exercise an independent policy.

Yet it has been asserted that India has enjoyed international personality as of 1919, since it was separately represented within the British Empire delegation at the Paris Peace Conference after the First World War and was regarded

---

<sup>11</sup> R.C. Ghosh, Treaties and Federal Constitutions, Their Mutual Impact (1961) pp. 16-21; Schachter, "The Development of Int. Law through the Legal Opinions of the U.N. Secretariat", 25 B.Y.I.L. (1948) pp. 91-102.

<sup>12</sup> McNair, Law of Treaties (1961) p. 641.



as one of the original members of the League of Nations.<sup>13</sup> India itself seems not to have fully grasped the implications of this specific event at the time. In a much quoted passage, the India Office in a memorandum to the Indian Statutory Commission in 1930 declared:

It must be emphasized that the grant of an international status to India before she was fully autonomous even in her internal affairs has resulted in a highly anomalous situation. The new status cannot by any process of reason be harmonised with the constitutional relations between India and His Majesty's Government. The precise implications of the change were not at the time fully realised.<sup>14</sup>

Two categories of treaties were applicable to India after 1919: those signed for India, and those concluded before and after that date in the name of the Crown, but whose application was extended to British India. The Treaty of 1920 relating to the French establishment at Balasore<sup>15</sup> seems to have been the first international agreement concluded by India. It was also a signatory of the Geneva Slavery Convention, 1926,<sup>16</sup> the International Convention for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact),

---

<sup>13</sup> Sirdar D.K. Sen, "The Partition of India and Succession in International Law", 1 Indian Law Review (1947) pp. 190-200; Mervyn Jones, "State Succession in the Matter of Treaties", 26 B.Y.I.L. (1947) p. 360; Ghosh, op. cit. n. 11 above, pp. 20-21.

<sup>14</sup> D.H. Miller, The Drafting of the Covenant, Vol. V, p. 1636.

<sup>15</sup> L.N.T.S., Vol. 1, p. 288.

<sup>16</sup> L.N.T.S., Vol. 60, p. 253; B.T.S., 1927, No. 16; Cmd. 2910; B.F.S.P., Vol. 134, p. 355.



1928,<sup>17</sup> and the Treaty for the Limitation of Naval Armaments, 1936.<sup>18</sup>

Whether or not in reality India did possess international personality prior to 1947 when it achieved its independence (in view of the fact that political responsibility was vested solely in the Governor-General-in-Council) it cannot be denied that at least she "was accepted as an international person by a number of States".<sup>19</sup> The partition of British India in 1947<sup>20</sup> into India and Pakistan raised the question of the classes of British treaties which affected India alone, those which affected Pakistan alone and those which affected both territories. A list of 627 Imperial treaties was thus compiled by the United Kingdom Government. Eleven of those were applied specifically to India; 191 were of exclusive interest to Pakistan, and 425 affected both Pakistan and India.<sup>21</sup> Of the 627 treaties, 350 were concluded after 1919, and the rest are chiefly treaties of the East India Company, including the

---

<sup>17</sup> L.N.T.S., Vol. 94, p. 57; B.F.S.P., Vol. 128, p. 447; U.S.T.S., 1929, No. 796.

<sup>18</sup> L.N.T.S., Vol. 184, p. 115; B.F.S.P., Vol. 140, p. 243; Hudson, Int. Legislation, Vol. VII, p. 263.

<sup>19</sup> I.L.A., The Effect of Independence on Treaties (1965) p. 35.

<sup>20</sup> Indian Independence Act (1947), 10 and 11 Geo. VI, C.30.

<sup>21</sup> Partition Proceedings, Vol. 3, Annexure V, pp. 217-276.





Anglo-Danish Commercial treaty of 1661.<sup>22</sup> The relevant treaties were divided between India and Pakistan in accordance with the provisions of the Indian Independence (International Arrangements) Order, 1947,<sup>23</sup> regarding the devolution of international rights and obligations. Soon after accession to sovereignty, India informed all the States concerned that she would continue to honour all treaty obligations existing between them and herself. This meant that India accepted all the treaties of British India as continuing in force as between her and third parties, even though many of those treaties were re-negotiated during the few years following independence. This attitude was in accord with the view expressed by the United Nations, in 1947, after consultation with the United Kingdom Government, regarding the status of India with respect to the transmission of treaty rights and obligations to her after independence.<sup>24</sup> India was said to be the same as British India, and as such, treaties of its predecessor affecting it continued without interruption. On the other hand, Pakistan was regarded as a new State which would not inherit treaty rights and obligations of the old State. In 1956, India further compiled a list of 45 British Extradition treaties

---

<sup>22</sup> O'Connell, State Succession, Vol. II (1967) p. 127.

<sup>23</sup> Gazette of India Extraordinary, August 14, 1947.

<sup>24</sup> See U.N. Press Release PM/473; Doc.A/CN.4/149; I.L.C. Yearbook, Vol. II, 1962, p. 101.



which she regarded as binding upon her,<sup>25</sup> although in State of Madras v. Menon<sup>26</sup> the Supreme Court of India held that Part II of the Fugitive Offenders Act of 1881 was no longer in force as between India and Singapore. On the other hand, in Dabrai v. Air India Limited,<sup>27</sup> the High Court of Bombay held that India was party to the Warsaw Convention of 1929 by virtue of continuity of identity. In the Right of Passage case,<sup>28</sup> India was held by the International Court of Justice to be bound, in virtue of succession, by the treaty of 1779 between the Portuguese and the Marathas.

What could account for the apparent inconsistencies not only in the judicial attitude of the national courts, but also in the general approach of the government to the application of even those classes of treaties acknowledged as surviving, in spite of the seeming automatic succession of India to the applicable treaties of British India? As McNair has pointed out,<sup>29</sup> the answer in each specific case must be sought in the intentions of the parties - that is, the basic objective of the particular treaty in question. It is submitted that the determination of the objective of a treaty - or the intentions

---

<sup>25</sup> Lok Sabha Debates, 12th Sess., 1956, App. 4, Annex. No. 42.

<sup>26</sup> International Law Reports (1954) p. 46.

<sup>27</sup> International Law Reports (1953) p. 41.

<sup>28</sup> I.C.J. Reports (1960) p. 7.

<sup>29</sup> McNair, The Law of Treaties (1961) p. 115.



of the parties - in order to ascertain its applicability to a given situation involves, for all practical purposes, a process of political judgment, and is accordingly governed by operative principles of politics rather than exclusively by impersonal legal rules. It is interesting to note that while Pakistan, which came into existence on the same day as India - August 15, 1947 - is itself inclined in general to claim automatic inheritance of treaties (e.g., the Convention relating to Opium Traffic and the Traffic in Women and Children<sup>30</sup>) by virtue of the signature of British India, the West Pakistan High Court in Barlas Brothers (Karachi) v. Yangtze (London) Limited<sup>31</sup> held that Pakistan, being a new State, could not succeed to the Geneva Protocol on Arbitration Clauses, 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.<sup>32</sup> Both the Protocol and the Convention had been signed and ratified on behalf of India and were implemented in India in 1937 by the requisite legislative procedure. Again, they did not contain exclusive territorial application clauses, and thus by the terms of the Indian Independence (International Arrangements) Order, 1947,<sup>33</sup> they should have

---

<sup>30</sup> Cmd. 368, p. 34; U.N. Doc.A/CN.4/150, p. 9.

<sup>31</sup> Barlas Brothers (Karachi) & Co. v. Yangtze (London) Ltd., Pakistan Legal Decisions, Vol. 9 (1959) p. 423. This judgment was upheld on appeal to the Pakistan Supreme Court, see ibid, Vol. II (1961) p. 573.

<sup>32</sup> Hudson, International Legislation, Vol. III, p. 2245.

<sup>33</sup> Loc, cit. note 23 above.





devolved upon both India and Pakistan. It would appear that in this particular instance Pakistan's attitude, as exemplified by the rulings of its courts, was influenced less by existing legal principles than by political factors.

The Irish Free State came into existence in 1922 pursuant to the Articles of Agreement of 1921 granting it the same constitutional status as the Dominions of Canada, Australia and New Zealand.<sup>34</sup> The definition of "Dominion" as provided by the Imperial Conference of 1926 was regarded by the Irish Free State as equally applicable to her. Its admission to the membership of the League of Nations in 1923 had confirmed its conviction as to its status as a full international person. In 1924, the Treaty of 1921 was registered with the League of Nations. This move was severely opposed by the British Government which contended that these Articles of Agreement possessed only constitutional significance and could not be regarded as a treaty in the international sense. It argued:

Since the Covenant of the League of Nations came into force His Majesty's Government have consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern the relations inter se of the various parts of the British Commonwealth. His Majesty's Government consider, therefore, that the terms of Article 18\* of the Covenant are

---

<sup>34</sup> 12 and 13 Geo. V, C.4.

\* Article 18 of the Covenant provides: "Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered".



not applicable to the Articles of Agreement of December 6, 1921.<sup>35</sup>

But the Irish Free State refused to accept the British Government's contention on the ground that "the obligations contained in Article 18...<sup>36</sup> are imposed in the same specific terms on every member of the League".<sup>37</sup> The British Government's attitude, however, based upon the alledged operation of the inter se doctrine, continued to be that changes in political institutions within the Commonwealth were purely of municipal legal significance. In so far as treaties were concerned, the British sovereign, the Head of the Commonwealth, could never contract with himself.<sup>38</sup> British treaties were, therefore, presumed to bind the Dominions as part of the realm. Thus, in 1901, after the formation of the Australian Commonwealth in 1900, with the legal competence to legislate in respect of external affairs, the Dutch Government complained to the United Kingdom Government regarding the failure of South Australia to fulfil the obligations of an Anglo-Dutch treaty concerning the treatment of merchant seamen. The Imperial Government adopted the atti-

---

<sup>35</sup> L.N.T.S., Vol. 27, p. 449.

<sup>36</sup> Article 18 of the Covenant of the League of Nations (1920).

<sup>37</sup> L.N.T.S., Vol. 26, p. 10.

<sup>38</sup> O'Connell, "The Crown in the British Commonwealth", 6 I.C.L.Q. (1957) pp. 103-119; R.Y. Jennings, "The Commonwealth and International Law", 30 B.Y.I.L. (1953) pp. 320-351; Hackworth, Digest of International Law, Vol. V, pp. 369-370.



tude that since the obligations of treaties rested on the King and hence directly on the Imperial Government, foreign nationals were entitled to look to His Majesty's Government for redress. Similarly, in 1907, the law officers advised the British Crown with reference to the Federal Commonwealth of Australia that "Treaties were made by His Majesty on behalf of his dominions, and the mere change of the internal administration of portions of those dominions could hardly be put forward as a valid reason for holding that a Treaty entered into on behalf of part of those dominions terminated on confederation".<sup>39</sup> In 1925, in answer to an inquiry by the United States Government, the British Government expressed the view that the Irish Free State continued to be bound by the Anglo-American Treaty of 1899 concerning the holding of property, irrespective of changes in its constitutional status.<sup>40</sup> This British attitude towards the question of application of treaties contracted by the British sovereign to the Dominions was clearly at variance with the view held by the Irish Government, which tended to suggest that Ireland's commitment to British treaties was based upon the accepted international practice with regard to treaty devolution, which was ultimately dictated by the requirements

---

<sup>39</sup> Law Officers' Opinion to the Colonial Office, December 2, 1907; McNair, Law of Treaties (1961) p. 646.

<sup>40</sup> McNair, Ibid., p. 640; Hackworth, Digest of International Law, Vol. V, p. 369; O'Connell, State Succession in Municipal Law and International Law, Vol. II (1967) p. 123.





of policy.<sup>41</sup> Irish policy was, therefore, to succeed to commercial and administrative treaties signed on her behalf by the United Kingdom.

At this juncture, it would seem appropriate to inquire into the effect of the inter se doctrine, or its intended effect, upon international law with respect to the relations between the Commonwealth countries as such. As McNair has pointed out,<sup>42</sup> the legal effect of this doctrine is today at least vastly diminished. But as it operated between the various Commonwealth countries (the United Kingdom inclusive) prior to the Second World War, its aim was to exclude the relations of these countries inter se from being regulated by international law rather than by "domestic constitutional or inter-imperial law".<sup>43</sup>

So far as the old Dominion were concerned, the general tendency was to succeed to treaties of a commercial or technical character almost automatically.<sup>44</sup> Yet they retained the

---

<sup>41</sup> Reference has already been made in the previous chapter to the statement of the Prime Minister of Ireland in the Dail (Parliament) in 1933 on this question. See McNair, op. cit., p. 641.

<sup>42</sup> McNair, op. cit., p. 115.

<sup>43</sup> Ibid., Fawcett, The British Commonwealth in International Law (1963) pp. 144-194.

<sup>44</sup> E.g., The great majority of the treaty obligations of Australia and New Zealand appear to be agreements signed by the U.K., which applied to these territories. See Australian and New Zealand Treaty Lists. In 1947, on achievement of independence, India was presented with a list of 627 treaties concluded on behalf of her by Britain. See Partition Proceedings (1947), Vol. 3, Ann. V, pp. 217-76; also C.W. Jenks, "State Succession in Respect of Law-Making Treaties", 29 B.Y.I.L. (1952) p. 130.



right to withdraw from such treaties. This right was established at the Colonial Conference of 1907.<sup>45</sup> But it is even more significant that, in constitutional terms, they achieved international personality by evolutionary process, prior to the attainment of full independence. This would appear to be the crucial factor in so far as succession to treaty obligations in international law is concerned. They not only, through various stages of constitutional development, acquired the legal competence to enter into international agreements with foreign States, but their international identity was acknowledged expressly or tacitly by some members of the international community, at least those who were willing to enter into direct agreements with them. It is this recognition of the separate international identity (even before complete independence) of the older Dominions of the Commonwealth which distinguishes them from the newly independent Commonwealth countries. The latter, even though they may have acquired a quasi-autonomous status under British constitutional law, did not in reality achieve a separate identity in international law.<sup>46</sup> Their governments were still largely representative, not responsible, in character in that all or nearly all legislative powers were vested in the colonial Governors who were directly responsible to the Colonial Office in London.

---

<sup>45</sup> Parliamentary Papers, Vol. 55, p. 483.

<sup>46</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 487.



This does not say why the older Dominions should succeed almost automatically to Imperial treaties while the newly independent States should not. It simply suggests why the question of State succession was not even raised in respect of the Dominions till the latter part of the 1920's.<sup>47</sup> By the end of the Second World War, however, the sovereign status of the Dominions had been unquestionably recognized.<sup>48</sup> One authority<sup>49</sup> has argued that the achievement of "plenary competence in treaty-making" together with the attainment of Dominion status was "an instance of State succession". In support of this contention, Professor O'Connell states:

That some discrimination in the selection of applicable British treaties occurred is clear from the omission from the lists of all treaties of political alliance, and of all the great peace treaties, other than those which had commercial clauses. Whether they were conscious of doing so or not, therefore, the compilers of the lists were clearly acting upon a succession notion, and deliberately restricting the devolution of Imperial treaties to selected categories which they regarded as 'non-personal' to the Imperial Government.<sup>50</sup>

But the fact that in compiling the treaty lists for the Dominions, the British Government limited itself to the 'non-personal' categories of "commercial, extradition and judicial process treaties" indicates that it must have been fully aware

---

<sup>47</sup> See, e.g., Dunn, "The New International Status of the British Dominions", 13 Va. Law Review (1927) p. 354ff.

<sup>48</sup> Corbett, loc. cit., n. 8 above; Scott, loc. cit., n 8 above.

<sup>49</sup> O'Connell, "Independence and succession to Treaties", 38 B.Y.I.L. (1962) p. 94.

<sup>50</sup> Ibid., pp. 88-89.





of the types of treaties the inheritance of which a new State would not normally consider as repugnant to its sense of sovereignty. It is submitted that British practice in this regard was not inconsistent with its general approach to the problem of succession in international law,<sup>51</sup> and did certainly accord with the traditional diplomatic practice of new States to inherit, even on a transitory basis, the predecessor's treaties of an economic, legal and technical nature. This would seem to be borne out by the fact that, although as a matter of Commonwealth custom the old Dominions could have considered themselves as bound by all Imperial treaties, they still had the option of denouncing those treaties to which they did not wish to adhere. Furthermore, they did in fact exercise that option by inheriting treaties which were precisely of the class indicated above. Thirdly, it does not appear that most of the Dominions, before the Irish Free State, openly questioned the validity of the inter se doctrine as it was supposed to operate between them. This would appear to indicate that these States were relatively contented with the existing constitutional arrangements, based upon the continuance of a common, indivisible crown, and supported by accompanying economic benefits.<sup>52</sup>

---

<sup>51</sup> Cf. The Law Officers' Opinions with regard to (1) the new States of Latin America; (2) Belgium after her independence in 1830; (3) Poland after 1919; (4) Finland after 1919; (5) Panama on its independence in 1903. McNair, The Law of Treaties (1961) pp. 601-605.

<sup>52</sup> Cf. The Imperial Preference System. In 1897 Britain denounced her commercial treaties of 1862 with Belgium and 1865 with the North German Confederation in compliance with Canada's suggestion that Commonwealth Preferential system be created.



On the other hand, the Irish Free State, while accepting the general practice of assuming obligations arising from treaties of economic and administrative character, sought to demonstrate the limits to which she was willing to go.<sup>53</sup> By explicitly challenging the binding force of the inter se doctrine in respect of itself, it was in effect attempting to assert its right to the full exercise of the faculties of government under international law untrammelled by Imperial constitutional impediments. In this connection, it is to be noted that when in 1930 Ireland accepted the compulsory jurisdiction of the Permanent Court of International Justice, it made no reservations (as was the practice of some States) regarding disputes between Commonwealth countries inter se. Pakistan followed the Irish example in 1960.

The above survey of the attitude of the older Commonwealth Dominions establishes first that they gradually acquired international capacity through Imperial constitutional adjustments. The process involved (1) the automatic application of commercial treaties to a colony; (2) the colony's right of consent to a treaty through separate adherence; (3) the right of separate denunciation of a commercial treaty; and (4) authority to engage in separate negotiation and signature of a commercial treaty. These constitutional adjustments, though of a municipal character, created certain consequences in international law.

---

<sup>53</sup> Mervyn Jones, "State Succession in the Matter of Treaties", 24 B.Y.I.L. (1947) p. 367.



First, the recognition of the international legal capacity of the Dominions by other States implied a recognition of the effect of such constitutional changes on the international plane. This, together with the prevalence of the juridical notion of the indivisibility of the Crown as well as the supposed operation of the inter se doctrine, may well have rendered unnecessary the need for the British Government to enter into devolution agreements with the Dominions as a mechanism for transferring treaty rights and obligations.

## 2. Succession by the New Commonwealth Countries

In contrast with the older Dominions, the new countries of the Commonwealth acceded to independence after the Second World War almost in one step. They did not go through the gradual and prolonged stages of constitutional adaptation which had been instrumental not only in providing the older Dominions effective training and experience in international affairs, but also in establishing their separate identity as international persons before their attainment of sovereign statehood. With Ireland's open defiance of the inter se principle of Imperial constitutional law and its general self assertive attitude in respect of freedom of choice of treaty obligations despite the official objection of the United Kingdom Government,<sup>54</sup>

---

<sup>54</sup> 27 L.N.T.S. (1924) p. 449. Even English Courts did not concede that the Irish Free State was truly a new State. See Murray v. Pakes, (1942) 2 K.B.123.







it became obvious that a precedent was indeed being set which might well have a far-reaching impact on the constitutional integrity of the Empire. The practice of applying Imperial treaties to a colony was not confined to the older Dominions, for as a matter of policy, only a small fraction of treaties were made to apply specifically to one colony. The post-war development of granting independence on a large-scale to the former colonies has emphasized the importance of ensuring the continued operation of the international treaties entered into by the predecessor State on behalf of its former colonies. As a result, the practice has emerged of concluding inheritance or devolution agreements between the departing imperial power and its former colonial territory before being granted political independence.

The practice originated with the independence of Iraq in June, 1930.<sup>55</sup> The agreement provided that:

The High Contracting Parties recognize that upon the entry into force of this Treaty, all responsibilities devolving under the Treaties and Agreements referred to in Article 7 hereof upon His Britannic Majesty in respect of Iraq will, in so far as His Britannic Majesty is concerned, then automatically and completely come to an end, and that such responsibilities, in so far as they continue at all, will devolve upon His Majesty the King of Iraq alone.

It is also recognized that all responsibilities devolving upon His Britannic Majesty in respect of Iraq under any other international instrument, in so far as they continue at all, should similarly devolve upon His Majesty the King of Iraq alone, and the High Contracting Parties shall immediately take such steps as may be necessary to secure the transference to His Majesty the King of Iraq of these

---

<sup>55</sup> 132 L.N.T.S., p. 366; Cmd. No. 3797, Article 8.



responsibilities.<sup>56</sup>

The text of the devolutionary agreement with Transjordan<sup>57</sup> was basically the same, mutatis mutandis, as the above, and its intended effect was complete succession. But in the case of Burma<sup>58</sup> and Ceylon,<sup>59</sup> the text was substantially changed, and this has remained the model, with minor modifications, for subsequent agreements with other new Commonwealth countries.<sup>60</sup>

Ghana, which became independent in March, 1957, was the first of the African Commonwealth countries to sign an inheritance agreement with Britain, and it is perhaps instructive to cite the terms of that agreement as evidence of the flexibility characterizing the more recent devolution agreements:

all obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Ghana, be assumed by the Government of Ghana;

the rights and benefits enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to the Gold Coast (former name of Ghana) shall hence forth be enjoyed by the Government

---

<sup>56</sup> U.K.T.S., No. 15 (1931); Cmd. 3797.

<sup>57</sup> U.K.T.S., Vol. 6, p. 144; Cmd. 6916.

<sup>58</sup> U.N.T.S., Vol. 70, p. 184; Cmd. 7360.

<sup>59</sup> U.N.T.S., Vol. 86, p. 28; Cmd. 7257.

<sup>60</sup> E.g., Malaya (Cmd. 346); Cyprus (Cmd. 1252); Nigeria (Cmd. 1214); Sierra Leone (Cmd. 1464); for analysis of the agreements affecting Singapore, Malaya and Malaysia, see Green, 4 Canadian Yb. of International Law (1966) p. 21 et. seq.



of Ghana.<sup>61</sup>

It is arguable that the above agreement might have been drawn up with the deliberate object of leaving the new State sufficient leeway for freedom of action as to the type of treaties held, upon construction, to be binding upon the successor State. One writer<sup>62</sup> has criticized the above draftsmanship as capable, in principle, of leading upon interpretation to virtual anarchy. O'Connell believes that under the terms of this agreement, the new State in question may not only be able to pick and choose, but may be tempted to lay claim to rights without reciprocal obligations. But this criticism would seem to be irrelevant in view of the fact that so far no new State has in practice gone to the extent of invoking any provisions of the devolution agreements as a legal justification for failure to fulfil a specific obligation incurred under a treaty acknowledged to have devolved upon it. As Lester has observed, "the doctrine that a State may not take the benefits of a treaty while denying the burdens prevents a new State from playing fast and loose, as does the obligation to recognise executed treaty-conveyances, and international law created by "law-making" treaties".<sup>63</sup>

---

<sup>61</sup> Cmnd. No. 345; U.N.T.S., Vol. 287, p. 233.

<sup>62</sup> O'Connell, 38 B.Y.I.L. (1962) p. 120; State Succession in Municipal Law and Int. Law, Vol. 2 (1967) p. 360.

<sup>63</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 503.





Clearly, those third States which have accepted, expressly or tacitly, such devolution agreements as "creating" rights and duties between themselves and the successor State, could not be said to regard them as instruments of anarchy. The United States, for instance, in its Treaties in Force,<sup>64</sup> lists against those new States which are parties to devolution agreements the treaties of their predecessors. As regards the succession of a new State to multilateral instruments of which the Secretary-General of the United Nations is the depositary, the tendency has been to follow the routine administrative procedure of transmission of treaty rights and obligations based upon deposited devolution agreements, even though the depositary has frequently sought from a new State an express declaration of its attitude to the relevant treaties.<sup>65</sup>

Although the inheritance agreements are not per se constitutive of legal rights and duties in respect of third parties,<sup>66</sup> their basic value may be "to provide a starting-point for the negotiation of new arrangements following the creation of new

---

<sup>64</sup> Treaties in Force (U.S. State Dept. Publication) where treaties are listed against new States parties to inheritance agreements as indicative of affirmative attitude of such States towards novation.

<sup>65</sup> See, e.g., the Secretary-General's policy statement in Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements, ST/LEG/7, p. 61 (August 7, 1959).

<sup>66</sup> De Muralt, The Problem of State Succession with Regard to Treaties (1954) p. 40.



States..."<sup>67</sup> It would, therefore, appear that they were formulated not with a view to providing the new States with a legal strait-jacket, but in recognition of the essential principle that a treaty remains binding only as between the contracting parties. For third States such agreements are res inter alios acta.<sup>68</sup> Furthermore, it is possible to argue that the devolution agreements are fundamentally consistent with realism, for, implicitly they acknowledge that certain treaties are by their very nature subject to the rule rebus sic stantibus, particularly where their raison d'etre can no longer be sustained by the existing state of facts, or a radical change of circumstance.<sup>69</sup>

It is always possible to look at any international agreement or treaty from two angles, namely, international law and municipal law. Thus the validity of the inheritance agreement, as a treaty, on the international level may have little to do with its implementation on the municipal level, for the effective application of the provisions of any international treaty is contingent upon the domestic constitutional processes of

---

67

Lester, loc. cit. n. 41 above, p. 506.

68

De Muralt, op. cit.

69

Harvard Research in International Law, Law of Treaties, 29 A.J.I.L. (1935), Suppl. 653, pp. 1096-1097; Lissitzyn, "Treaties and Changed Circumstances (Rebus sic Stantibus)", 61 A.J.I.L. (1967) pp. 896-897; McNair, The Law of Treaties (1961) pp. 436-457; I.L.C. Yearbook, vol. I, 1963, pp. 136-158; Vienna Convention on the Law of Treaties, Article 59, U.N. Doc. A/CONF.39/11, pp. 365-382, (26 March-24 May, 1968).



each State.<sup>70</sup> By what means does a devolution agreement become effective in the domestic law of a successor State? Does the duty to give effect to it rest solely with the treaty-making organ - the executive? Or does its implementation constitutionally require distinct legislative approval? The case of Somalia provides a useful illustration of the problem which this may pose in a new State.

Article 4 of the Somali Act of Union, passed by the National Assembly in January, 1961, effective retroactively as of July 1, 1960, when Somalia became independent, provides:

(1) All rights lawfully vested in or obligations lawfully incurred by the independent Governments of Somaliland and Somalia or by any person on their behalf, shall be deemed to have been transferred to and accepted by the Somali Republic upon the establishment of the Union.

(2) Whenever such rights or obligations arise from any international agreement their acceptance by the Somali Republic shall be subject to Article 67 of the Constitution.<sup>71</sup>

Article 67 of the Somali Constitution provides:

The Assembly authorizes by law the ratification of political, military and commercial international treaties or of those which involve modification of laws or financial expenditures not foreseen in the budget.<sup>72</sup>

It seems clear from the above that the stipulations of the domestic constitution of a new State may operate in a manner

---

<sup>70</sup> Holloway, Modern Trends in Treaty Law (1967) pp. 238-249; see also pp. 151-237.

<sup>71</sup> Whiteman, Digest of Int. Law, Vol. 2, p. 956.

<sup>72</sup> Constitution of July 1, 1960, Art. 67, A.J. Peaslee, Constitutions of Nations, Vol. 1 (1965) p. 791.





prejudicial to the automatic enforcement grosso modo of an inheritance agreement, even if it were politically possible to do so. It is submitted that, from the point of view of State succession, it is immaterial whether the devolution agreement, being a treaty in itself, is left to be applied on the municipal plane exclusively by the executive organ or with specific legislative authorization; its implementation (i.e., the actual succession of a new State to the treaties of its predecessor) is necessarily a political act, requiring the subjective discretion of the relevant organs of government. Thus, the flexibility of these agreements, as demonstrated by the text of the Ghana agreement cited above, does allow the new State sufficient latitude to determine the applicable treaties, besides the purely localized or dispositive ones, to which it is prepared to succeed. This by no means implies illimitable freedom to "pick and choose".

As the quality and content of the present inheritance agreements are substantially different from the initial ones drawn up for Iraq<sup>73</sup> and Jordan,<sup>74</sup> they could not have been intended to bring about automatic or universal succession<sup>75</sup> to treaty obligations in international law. It is an accepted principle of political administration that the intrinsic

---

<sup>73</sup> Cmd. 3797, U.K.T.S. No. 15 (1931), Article 8.

<sup>74</sup> Cmd. 6916, U.N.T.S. Vol. 6, p. 144.

<sup>75</sup> See works by O'Connell cited above.



interests of the State must be protected in its relations with other States. Thus, a State has always displayed considerable caution as to the extent to which it is willing to undertake binding international commitments, particularly where such are potentially liable to impair its national interests. It is considerations of this character which have tended to guide the attitude of the new States in their practical application of the devolution agreements they may have concluded with the retiring imperial power.

The actual selection of the treaties whose continued application to the territory of the new State has been acknowledged shows that, by and large, little significance is attached by the successor State to the existence or non-existence of a devolution agreement. As O'Connell has aptly noted, often a new State has selected some conventions or treaties which it claimed to have inherited and has ignored others, even though they may have been applied to it as a colony, regardless of whether or not it was a party to a devolution agreement.<sup>76</sup>

Prior to Nigeria's independence in 1960, 78 multilateral and 222 bilateral treaties concluded by Britain affected it. Accordingly, it entered into a devolution agreement with Britain regarding the inheritance of the obligations arising under those treaties.<sup>77</sup> This agreement was communicated to the

---

<sup>76</sup> O'Connell, 38 B.Y.I.L. (1962) p. 123.

<sup>77</sup> Cmnd. No. 1214.



Secretary-General of the United Nations on June 23, 1961,<sup>78</sup> acknowledging succession to treaties administered by the United Nations. But in 1965, when Nigeria published a list of treaties to which it agreed it was party by succession,<sup>79</sup> only 48 treaties were listed, seven of them being bilateral. Some of the multilateral treaties involve membership of the international organizations, for instance, the I.M.F. and the I.B.R.D., to which succession is not possible except in conformity with the express provisions of their respective constituent instruments.

Similarly, Ghana,<sup>80</sup> Malaya<sup>81</sup> (now Malaysia) and Sierra Leone,<sup>82</sup> to mention but a few of the new Commonwealth countries, have all notified the U.N. Secretary-General of their succession by virtue of the devolution agreements to existing British treaties which were applicable to them before independence. Yet their pattern of choice in listing the relevant treaties appears largely to be dictated by considerations of policy. Ghana, in 1957, claimed to have succeeded to ten I.L.O. Con-

---

<sup>78</sup> U.N. Doc. A/CN.4/150, p. 34.

<sup>79</sup> Nigeria Government Notice No. 1881, Official Gazette, September, 1965, Vol. 52, No. 77, p. 1600.

<sup>80</sup> U.N. Doc. A/CN.4/150, p. 18.

<sup>81</sup> Ibid., pp. 19-20

<sup>82</sup> Ibid., p. 41.





ventions,<sup>83</sup> Malaya, seven;<sup>84</sup> Cyprus, ten;<sup>85</sup> and Nigeria, fifteen,<sup>86</sup> In so far as bilateral treaties are concerned, the emergent countries are more circumspect in inheriting them. Where there is undoubted economic or commercial necessity for continuity of treaty relations, the new States almost invariably respond positively by declaring their recognition of the continued validity of the treaties in question. But often such a policy is adopted to gain time before asking for a renegotiation of the treaties. India did this after its independence in 1947. New States have shown an inclination towards renegotiation of certain bilateral treaties perhaps because this seems to offer them fresh opportunity of reaching agreements with third States, which will better serve their present interests and national needs.

Under the terms of the Anglo-Japanese Agreement of December 29, 1952, all traffic rights in Singapore were conferred upon Japan.<sup>87</sup> Singapore united with Malaya to form Malaysia on September 16, 1963, but on August 9, 1965, it seceded from the federation and constituted the independent

---

<sup>83</sup> I.L.O. Official Bulletin, Vol. XL, No. 8 (1957) p. 373.

<sup>84</sup> Ibid., p. 442.

<sup>85</sup> Ibid., Vol. XLIII, No. 7 (1960) pp. 522-523.

<sup>86</sup> Ibid., p. 524.

<sup>87</sup> See S. Tabata, "The Independence of Singapore and Her Succession...", 12 Jap. Ann. Int. Law (1968) pp. 36-44.



State of Singapore. Soon after the formation of the federation, however, Malaysia informed Japan that Singapore was no longer within the sphere of the application of the Anglo-Japanese treaty of 1952, and indicated that it would like to enter into a new agreement with Japan regarding air services between the two countries. Meanwhile Japanese air traffic rights were to be curtailed as of January 1, 1964, pending the conclusion of a new agreement. Japan felt unable to accept the Malaysian move, regarding its rights under the Anglo-Japanese Treaty, 1952, as "vested rights" which Malaysia should respect. After protracted exchanges, Japan agreed to a re-negotiation of the treaty. The new Malaysian-Japanese Agreement for Air Services was concluded on February 11, 1965, at Kuala Lumpur, with minor changes in content. Meanwhile, Singapore, after seceding from Malaysia,<sup>88</sup> has acknowledged succession, by the operation of paragraph 13 of the Independence of Singapore Agreement,<sup>89</sup> to the Malaysian-Japanese Agreement.

On the other hand, when Singapore agreed with Malaya in 1963 to establish the Federation of Malaysia, the agreement (to which the United Kingdom was also a party) stipulated that the 1957 Defence Agreement between the United Kingdom and Malaya would continue to apply to all the territories of

---

<sup>88</sup> For a detailed discussion of this subject and legal problems raised, see Green, 4 Canadian Yb. I. Law (1966) pp. 37-42.

<sup>89</sup> Independence of Singapore Agreement, Singapore Govt. Gazette, Vol. 7, No. 66, August 9, 1965.



Malaysia, subject only to the proviso that Malaysia would grant to the Government of the United Kingdom the right to continue to maintain its military bases in Singapore.<sup>90</sup> Singapore has continued to regard itself as being bound by this agreement in spite of its obvious political character and the fact that its achievement of sovereign statehood was a clear case of succession. All these examples illustrate the vast anomalies and inconsistencies characterizing the approach of the new States to the problem of succession, and underscore the diversity of factors, other than purely legal considerations, which may lead to the maintenance by a successor State of existing treaty relations.

Because of the widespread use within the Commonwealth of the devolution agreements as a typical mode of transferring international rights and obligations to a successor State, one may be tempted to assume that this practice is universally acknowledged within the Commonwealth itself. However, some of the new Commonwealth countries have been less favourably disposed towards entering into inheritance agreements with their parent State. Viewing these agreements as essentially not conducive to the freedom of choice which a sovereign State is entitled to exercise in the assumption of contractual obligations, they have, by unilateral declarations, expressed their intentions concerning treaties applicable in respect of their territories before independence. The attitude of

---

<sup>90</sup> 2 International Legal Materials (1963) p. 817; Ibid., (1965) p. 938.





Tanganyika (now Tanzania), Uganda, Kenya and Malawi probably provides the most dramatic example of how the psychology of new-won independence might, in certain cases, lead to the development of a somewhat negative attitude on the part of a new State towards subrogation.

On November 30, 1961, Prime Minister (now President) Nyerere made an important policy statement in the National Assembly on Tanganyika's view of subrogation to previous Imperial treaties.<sup>91</sup> In a note, dated December 9, 1961,<sup>92</sup> to the Secretary-General of the United Nations, Mr. Nyerere explained Tanganyika's proposed action with respect to bilateral and multilateral treaties concluded on behalf of Tanganyika by the United Kingdom prior to the former's independence. Tanganyika would regard bilateral treaties as remaining in force, on a basis of reciprocity, for a period of two years from the date of independence, during which time it would negotiate with regard to the continuance of such treaties. "At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated".<sup>93</sup> This would appear to

---

<sup>91</sup> For full text of statement see 11 I.C.L.Q. (1962) pp. 1210-1214.

<sup>92</sup> Reprinted in Whiteman, Digest of International Law, Vol. 2. pp. 1000-1001.

<sup>93</sup> Ibid., p. 1001.



be in reference to the principle rebus sic stantibus, according to which a treaty whose essential objective is no longer compatible with the changed circumstances may be brought to an end.

As regards multilateral treaties, the statement declared that Tanganyika was fully conscious of their special character, and as such was prepared to deal with each multilateral treaty previously applicable within its territory by specific arrangements, that is by reviewing each individually, and indicating to the depositary what step, in each case, it wished to take in relation to the instrument. It is difficult to see why this is so different from re-negotiating bilateral agreements.

Uganda, in its note of February 12, 1962, to the Secretary-General, and Kenya in a similar declaration<sup>94</sup> indicated their intention to continue to honour existing treaty obligations within specified periods of varying lengths, during which the relevant instruments would be subjected to legal examination for the purpose of terminating those which, by virtue of the ordinary rules of customary international law, could not survive the change of sovereignty. It is interesting to note that Guyana in its note of June 30, 1966, to the Secretary-General,<sup>95</sup> has adopted basically the same approach except that it did not commit itself to any specific time-limit during which some of the treaties would have been declared to have lapsed.

---

<sup>94</sup> I.L.A. The Effect of Independence on Treaties (1965) pp. 386-87.

<sup>95</sup> I.L.A. Conference (Buenos Aires, 1968) Interim Report of the Committee on State Succession, pp. 16-17.



It has been suggested that the participation of Uganda, Kenya and Tanganyika in the East African Common Services Organization may well have influenced the general tenor of their domestic legal policies with regard to State succession.<sup>96</sup> But this would seem to be irrelevant since the legal problems of State succession could not have affected the economic community of East Africa as a single entity with recognizable international personality. On the contrary, the problem, affecting each of the member-States as it does in a slightly different manner, has tended to receive varying emphasis by the individual States depending upon their evaluation of the purposes of specific treaties which were applicable in their territories. This "temporizing" technique in the practice of subrogation has, however, been criticized<sup>97</sup> on the grounds that the successor State in effect unilaterally lays claim to the right to pick and choose without allowing a like right to the third party; it is not possible to complete the review of all relevant treaties within the specified period, hence the new State could be estopped from denying that its treaties have lapsed; the operation of the temporizing doctrine could well lead to legal chaos since the administrative and diplomatic relations of States are based on treaty practice; and again, the problem of determining the legal basis upon which heritable

---

<sup>96</sup> O'Connell, op. cit., note 22 above, p. 116.

<sup>97</sup> Ibid., pp. 117-121.





treaties may be distinguished from the non-heritable ones is no less accentuated.

Whether or not in practice the international relations of those new States that have opted for a unilateral declaration of policy regarding subrogation to existing treaty rights and obligations have been adversely affected, two fundamental points need be emphasized about this practice. First, in adopting this policy, a new State is in effect putting all the interested parties on notice as to where it stands in relation to its predecessor's treaties. Secondly, the success of a unilateral action of this nature by a new State depends, in the final analysis, upon the attitude of the third States. If the third States acquiesce in this action, it will be possible for the new State to make the desirable adjustments in its treaty relations through accepted diplomatic procedures. On the other hand, a vigorous and express opposition by third States may well lead to a disruption of the normal international life of the new State.

### 3. Succession Under the French System

The practice of committing the new States on independence to the treaty rights and obligations of the metropolitan power which affected them by means of devolution treaties is an exception rather than the rule under the French system. For the most striking feature of State succession in the French Community is the almost non-existence of a highly formalized and extensive system of devolution agreements between France



and her ex-colonies. Yet by conduct and practice some of the newly independent French-speaking countries tend to regard themselves as successor to French international rights and obligations which applied to them prior to independence. Cambodia,<sup>98</sup> Laos,<sup>99</sup> Vietnam<sup>100</sup> and Morocco,<sup>101</sup> which were French protectorates under the Fourth Republic, were assigned treaty obligations on independence by means of inheritance agreements. But when, under the Fifth Republic, France's African colonies acceded to full international status, this technique of transfer of international obligations was no longer considered fashionable. What then must have accounted for this seeming indifference towards the utilization of devolution treaties as a mode of securing the continued observance by the new States of France's previous international commitments?

The evolution of the international capacity of the French protectorates was in certain respects similar to that of the older Dominions in the British Commonwealth of Nations. After

---

<sup>98</sup> France-Cambodia Agreement, August 29 and September 9, 1953, Journal Officiel, May 3, 1959.

<sup>99</sup> Treaty of Friendship and Co-operation, signed at Paris, October 22, 1953, Documentation Francaise (December 5, 1953) No. 1811.

<sup>100</sup> Treaty of Independence, Art. 2, June 4, 1954, Documentation Francaise (June 15, 1954) No. 067.

<sup>101</sup> Diplomatic Convention Between France and Morocco, May 20, 1956, Documentation Francaise (1956), Nos. 0328 and 0363; Article 11, Annuaire Francais de droit international (1956) p. 133.



the Second World War, France, which had been acting in a representational capacity for these territories, began to extend to the local authorities the rights and obligations arising under international treaties. On August 11, 1950, France and Vietnam informed the Secretary-General of the U.N. of the transfer of certain treaty rights and obligations to the Vietnamese Government by France. On October 7, 1950, France and Laos notified the Secretary-General of similar action in respect of Laos. Again, France and Cambodia jointly notified the Secretary-General of the United Nations on October 2, 1951, of the transmission of applicable treaty obligations and rights to the Government of Cambodia.<sup>102</sup>

The devolution agreement of May 20, 1956, between France and Morocco stipulated that

Morocco shall assume the obligations arising out of international treaties concluded by France on behalf of Morocco and out of such international instruments relating to Morocco as have not given rise to observations on its part.<sup>103</sup>

Thus, Morocco, like the other former French protectorates, has come to consider itself bound by relevant French treaties in virtue of these agreements. When, in the case Concerning the Temple of Preah Vihear,<sup>104</sup> Thailand challenged Cambodia's invoca-

---

<sup>102</sup> I.L.C. Yearbook, Vol. II, 1962, p. 11; De Murlalt, The Problem of State Succession with Regard to Treaties (1954) pp. 129-130; Whiteman, Digest, Vol. 2, pp. 976-977.

<sup>103</sup> Whiteman, loc. cit., p. 984.

<sup>104</sup> I.C.J. Reports (1961) p. 17; Oral Pleadings, pp. 71-73.





tion of the General Act for the Pacific Settlement of International Disputes, 1928, the latter based its plea on the fact that relevant treaties concluded by France had been concluded on behalf of Cambodia. Morocco has acknowledged succession to seven of the thirteen treaties of which the Secretary-General of the U.N. is the depositary.<sup>105</sup> Similarly, Laos has acknowledged continuity in respect of the Load Line Convention, 1930, and the Hague Conventions of 1899 and 1907.<sup>106</sup>

It is significant to note that, the devolution agreements apart, France's protected territories, while still members of the French Union under the Fourth Republic, had even before 1950 come to be treated as possessing full international capacity. They could enter into direct agreements with other States. France no longer regarded itself as making treaties on behalf of them. In 1950, the opinion of the Legal Committee of the French Union was sought in connection with the extent to which the associated States of Indochina, having acquired international capacity, should continue to be bound by treaties concluded between France and third States.<sup>107</sup> The Committee expressed the view that since France was the authority respon-

---

<sup>105</sup> U.N. Status of Multilateral Conventions ST/LEG/3; see Morocco's declaration in respect of certain conventions which had been applied in its territory. Practice of the Secretary-General as Depositary of Multilateral Agreements, ST/LEG/7.

<sup>106</sup> U.N. Status of Multilateral Conventions, ST/LEG/3.

<sup>107</sup> O'Connell, note 22 above, p. 145.



sible for their external relations, applicable treaties concluded by her remained binding, according to general principles of international law, upon them, notwithstanding changes in their constitutional status.<sup>108</sup> It is clear, then, that the former French protectorates, like the older Dominions of the Commonwealth, achieved international identity through domestic constitutional adjustments before full independence. Official French opinion favoured the continuity of treaty obligations in those territories. But inheritance agreements were employed as a basic device for securing such continuity.

The loi-cadre of 1956<sup>109</sup> presaged the radical changes which were to take place in French imperial relations under the Fifth Republic, for it gave decisive impetus to the policy of granting external autonomy to France's overseas territories. It is true the policy may have been motivated partly by France's realization that in the post World War II world, "political centralization was no longer possible", and partly by its continued desire to maintain "the idea of Greater France according to a new formula".<sup>110</sup> This is what the idea of the French Community represented. The loi-cadre, in reality a form of enabling legislation, gave the French Overseas Terri-

---

<sup>108</sup> Ibid.

<sup>109</sup> K. Robinson, "Constitutional Reform in French Tropical Africa", Political Studies, No. 1 (1958), pp. 47-69.

<sup>110</sup> P.F. Gonidec, "La Communauté", Public Law (Summer, 1960) p. 178.



tories internal self-government and empowered their local assemblies to elect to executive councils ministers responsible to the assemblies. When General de Gaulle created the French Community in 1958, the Overseas Territories were asked to choose in the constitutional referendum between complete self-determination and membership in the Community. Only Guinea opted for full independence and this led to its complete separation from the Community.<sup>111</sup> Most of the overseas territories, with the exception of the smaller territories which decided to keep their status as overseas territories, chose to remain member States of the Community.<sup>112</sup> One fundamental characteristic of the Community was centralization of constitutional power with regard to defence and foreign policy, economic and financial policy, currency, external transport and telecommunications, policy relating to strategic materials, the control of justice and higher education.<sup>113</sup> Seen from the overall constitutional structure and the general division of powers between the member States and the Community, with France at the apex, federalism

---

<sup>111</sup> Ibid., p. 179.

<sup>112</sup> Member States of the Community were Senegal, Mauritania, Ivory Coast, Dahomey, Upper Volta, Niger, and Sudan, Chad, Congo (Brazzaville), Gabon, Ubangui Chari (Central African Republic) and Madagascar (now Malagasy Republic). The smaller territories which decided to maintain their status as Overseas Territories comprise French Somaliland, the Comoro archipelago, St. Pierre-et-Miquelon, French Polynesia and New Caledonia.

<sup>113</sup> Article 78 of the French Constitution (1958).







suggests itself as the underlying principle of its organization. On the other hand, the concentration in the Community (France principally) of the most important powers the independent exercise of which is the fundamental attribute of a sovereign State suggests the continued predominance of the conception of France as a unitary State. Thus, in actual fact, the member States were little more than local administrations responsible for matters of purely local interest.

It was not, however, until May, 1960, that the French Constitution was amended to permit member States of the Community to become fully independent while retaining their membership in it.<sup>114</sup> Most of the African States thereafter became independent republics. Although some of the new African republics<sup>115</sup> have since signed agreements with France (the Community) with a view to the co-ordination of their economic, financial, defence and diplomatic policies, others have done so without retaining membership in the Community.<sup>116</sup>

No doubt, the architects of the French Community in effecting the transfer of sovereignty to the former territories through the political act of their constitutional superior - that is, by amending the relevant provisions of the French Con-

---

<sup>114</sup> Articles 85 and 86, Ibid.

<sup>115</sup> These consist of Central African Republic, Congo B., Chad, Gabon and the Malagasy Republic, Journal Officiel, July 30, 1960.

<sup>116</sup> They include Ivory Coast, Upper Volta, Dahomey and Niger, Journal Officiel, July 27, 1961; Mauritania, Ibid., August 4, 1961.



stitution - may have been guided by the desire to avoid the abrupt disruption of legal continuity. But, from the point of view of State succession to treaties, this transfer of sovereignty (irrespective of whether or not it is secessionary in character) becomes the crucial element in the international identity of the new States. It endows them with plenary competence with respect to entering into treaty relations with other States. That is to say, they now have the capacity to commit themselves to specific obligations arising under international treaties. This is in accord with accepted principles of positive international law. However, it is well known that none of the newly independent members of the French Community entered into any devolution agreements with France regarding the taking over of its treaty obligations. Yet in their diplomatic practice, some of them have given the impression that they have succeeded to all previous French treaty rights and duties which applied to their territories while they were still dependent.

One of the most frequently quoted pieces of evidence of the "universal succession" of the former French territories to treaty obligations and rights is the communication of the Republic of the Congo (Brazzaville) with the United States Embassy. In a note dated August 5, 1961, the Congo Government, in response to an American request, declared its attitude regarding the continued application of international agreements concluded by France on behalf of her prior to independence. It stated:



In accordance with the practices of international law and because of the circumstances under which the Republic of the Congo attained international sovereignty, the latter considers itself to be a party to the treaties and agreements signed prior to its independence by the French Republic and extended by the latter to the former overseas territories, provided that such treaties or agreements have not been expressly denounced by it or tacitly abrogated by a text replacing them.<sup>117</sup>

This declaration was practically repeated in its communication of October 11, 1962, to the Secretary-General of the United Nations.<sup>118</sup> On the strength of it, the United States has listed against the Congo several treaties concluded with France.<sup>119</sup> In a note of December 4, 1962, addressed to the United States, the Malagasy Republic acknowledges that it "considers itself implicitly bound by such texts unless it explicitly denounces them".<sup>120</sup>

Nevertheless, other former French territories in acknowledging the validity of applicable French treaties, have attached extensive reservations. Senegal<sup>121</sup> in a policy statement issued on February 20, 1961, recognized the continuing validity of French treaties, except "political treaties of guarantee, alliance, neutrality, arbitration and mutual assist-

---

<sup>117</sup> 2 Whiteman, Digest of Int. Law (1963) p. 976.

<sup>118</sup> U.N. Doc. A/CN.4/150, p. 25.

<sup>119</sup> U.S. Dept. of State, Treaties in Force (1966) p. 43.

<sup>120</sup> Ibid., (1964) p. 24.

<sup>121</sup> See Gautron in Annuaire française (1962) p. 836.







ance". She accepted the validity in principle of "law-making" treaties, but reserved the right to adhere formally. Subject to the right of separate denunciation, she acknowledged the binding force of multilateral treaties of a "localized" nature; nonetheless, she refused to recognize treaties relating to international organizations.<sup>122</sup> In its statement of October 25, 1962, the Government of the Central African Republic<sup>123</sup> based its recognition of the validity of previous French treaties on their compatibility with "the independence of the new sovereign States". It declared:

In regard to international relations, treaties concluded by the former colonizing power in the name of its overseas territories can be considered to remain in force only in respect of those clauses which are not incompatible with the independence of the new sovereign States. Accordingly, the Central African Republic reserves the right to denounce treaties which do not appear to it to recognize its newly acquired sovereignty.<sup>124</sup>

In the opinion of Dr. O'Connell, the fundamental reason for "universal succession" in the ex-French colonies "appears to lie in the processes by which treaties were applied to the French colonies, and in the survival of these treaties in internal law after independence".<sup>125</sup> He maintains that

---

<sup>122</sup> However, see her declaration acceding to membership of the I.L.O., I.L.O. Official Bulletin, Vol. XLIII, No. 7 (1960) pp. 256-257. She accepted the validity of 13 of the I.L.O. Conventions.

<sup>123</sup> U.S. Dept. of State, Treaties in Force (1966) p. 27.

<sup>124</sup> Ibid.

<sup>125</sup> O'Connell, 38 B.Y.I.L. (1962) p. 109.



... so far as the international acts binding the Empire, Union or Community in its successive stages are concerned, through promulgation these gradually became part of the local legal orders, so that they survived the transfer of sovereignty in virtue of the survival of the legal system.<sup>126</sup>

If, however, this theory is accepted, it becomes difficult to explain why such States as the Central African Republic,<sup>127</sup> and Senegal<sup>128</sup> have made such wide reservations in their acknowledgement of the applicability of French international treaties; or why even those<sup>129</sup> which regard themselves as automatically bound by such treaties have been cautious and rather selective in claiming succession to some of the treaties signed on their behalf by France; or why Algeria<sup>130</sup> and Upper Volta<sup>131</sup> should theoretically completely disclaim succession to French treaties. Although Professor O'Connell would prefer, in terms of the general theory of State succession, a juridical doctrine in

---

<sup>126</sup> Ibid.; State Succession, Vol. I (1967) p. 75.

<sup>127</sup> Loc. cit., n. 123 above.

<sup>128</sup> Loc. cit., n. 121 above.

<sup>129</sup> Cf Practice of Congo (B.), Senegal, Mali in respect to I.L.O. Conventions; for succession to treaties of which the U.N. is depositary, see ST/LEG/3; ST/LEG/7; see also U.N. Doc. A/CN.4/150.

<sup>130</sup> Yet it has, in practice, claimed the validity of certain conventions concluded by France. See Chapter 2 above.

<sup>131</sup> See, e.g., Doc. A/CN.4/150, p. 38; I.L.O. Official Bulletin, Vol. XLIII, No. 7 (1960) p. 532.



which the presumption of continuity was the rule,<sup>132</sup> he appears to strike a more realistic note when he concludes that "No coherent doctrine on State succession can be formulated as a result... of what the newly independent States have done, for they have acted in inconsistent fashion".<sup>133</sup>

#### 4. General Evaluation and Conclusion

The raving political realist will insist that international law plays no controlling role in the process of international relations, since a State may decide for itself what the acceptable norms are, and how they should be interpreted and applied under given conditions.<sup>134</sup> Thus he holds out the national interest as the irreducible determinant of its international legal behaviour. The legal idealist, on the other hand, out of a commitment to strengthen the effective authority of international law, may seek to discover new legal rules that should

---

<sup>132</sup> "...evident moral and sociological pressures emphasize the need for continuity and the avoidance of disruption, while theory remains enmeshed in the nineteenth-century conception of sovereign will... The solution lies in a presumption of continuity which concrete analysis may rebut..." O'Connell State Succession, Vol. 1 (1967) pp. 34-35.

<sup>133</sup> Ibid., Vol. 2 (1967) p. 140.

<sup>134</sup> See, e.g., John H. Herz, Political Realism and Political Idealism (1951) p. 18 et. seq.; Hans J. Morgenthau, Politics Among Nations (3rd ed., 1960) p. 281 et. seq.; George Kennan, American Diplomacy, 1900-1950 (1951) p. 95; For an exciting study of how the principle of realism operates in the practice of States, see Percy Corbett, Law in Diplomacy (1959).





regulate every aspect of inter-State relations.<sup>135</sup> It seems futile to attempt to draw a rigid line between the purely political and the exclusively legal factors which govern, or must govern, a State's international conduct. It is, of course, a truism that all too often States claim the "ultimate legislative and adjudicative" functions in matters of international law,<sup>136</sup> as if these were an inherent and self-evident attribute of State sovereignty. Taking advantage of the decentralized character of the international society, a State may attempt to promote as rules of law values or policies which are directly related to its individual aspirations.

Relations between States, no doubt, are regulated by a wide range of factors. But what must be stressed is that legal principles and political factors, two fundamentally inter-dependent variables, have always influenced the behaviour of States in their relations inter se. Treaty relations are a means by which States create for themselves not only a regime of law, but a community of interest the realization of which

---

<sup>135</sup> Thus Charles de Visscher urges that "The hour is not one for doctrinal generalizations moving in the rhythm of a transcendental logic, or for brilliant systematizations in which intellectual ingenuity often counts for more than respect for the facts. It is rather one that challenges us to recognize the limits which in our day the dependence of international law on the historical forms of power distribution sets to its effectiveness... Every renewed recognition of the foundations of power stimulates a renewal of values; every return to the realities holds promise of effectiveness". Theory and Reality in Public International Law (1957) p. 365.

<sup>136</sup> Kaplan and deB. Katzenbach, The Political Foundations of International Law (1961) p. 8 et. seq.



depends upon the good faith and effective co-operation of the States themselves.

Unfortunately, the concept of sovereignty, as obstructive as it seems to the progressive development of the rules of international law, is still widely accepted by States as the very basis of their superior authority within their domestic jurisdictions, and of their formal equality one with another. For the new States, as for the old, this concept has a great attraction, and constitutes a decisive factor in determining their orientation to problems of contemporary international law.<sup>137</sup>

The study, therefore, of the problem of State succession to treaties within the context of the constitutional history of the new States, both under the British and French imperial systems, enables us to appreciate fully the effect of the

---

<sup>137</sup> Professor Percy E. Corbett in his fascinating study of the practices of Great Britain, the United States and the Soviet Union comes to the conclusion that "The enthusiasm reserved by Soviet jurists for the Socialist importations into the body of international rule, and their constant denunciation of any legal propositions tending to limit Soviet sovereignty, reveal the essential rejection of world community under a legal system not wholly of their own making. But in the democracies also the notion of national interest still outweighs the claims of a world community subject to law. In matters that concern them deeply, though the law is still invoked, the specific rule always supports the national case, and no authority is permitted to gainsay the national interpretation. In these circumstances with political considerations dictating the content of the rule, it becomes clear that law is being made a tool of policy, and the notion of an objectively binding system abandoned in practice". (Emphasis added). Law in Diplomacy (1959) p. 107.



interaction of political and legal factors upon the legal attitudes of the new States. As we have seen, these States vigorously believe, in their effort to change certain of the old rules of international law, that for it to be useful, international law must be closely related to the actual conditions of the contemporary international society, in which it is to be applied both as a rule of order and as a principle of justice. Their general suspicion of treaties concluded under the colonial regime as "unequal treaties" has tended to influence their reaction to the problem of State succession to the treaty obligations of their predecessor.<sup>138</sup> From the point of view of the new States, reference to "the actual conditions of the contemporary international society" has little to do with the actual distribution of power among States. On the contrary, it emphasizes the fact of the proliferation of new States as a result of the break up of the colonial system, as well as the formal aspect of their sovereignty.

These considerations again emerge in bold relief in our study of subrogation in the former British and French colonies. For instance, during the early days of the Commonwealth, when only a few countries had attained Dominion status, the theory of the indivisibility of the Crown had especial significance for treaties concluded in the name of the Empire. Since treaty-

---

<sup>138</sup> Cf. Prime Minister (President) Nyerere's speech to the Tanganyika National Assembly on Tanganyika's policy in respect of succession to previous British treaties. 11 I.C.L.Q. (1962) pp. 1210-1214.







making, under the British constitutional system, is a prerogative of the Sovereign acting on the advice of the Executive, it became easy for the United Kingdom Government to commit its overseas possessions internationally. This, in turn, supported the unity of the Imperial system in international affairs. So was the inter se doctrine, a logical corollary of the doctrine of "indivisible Crown". This system and practice could last so long as the fundamental interests of the Commonwealth Countries - i.e., their economic and political interests - were believed to be identical. Again, there was no immediate danger of secession, after the American War of Independence of 1776, in any part of the Empire.

But the gradual changes in the political status of the Dominions, and their subsequent acquisition of full international capacity were bound to affect in the long run the notion of an undivided Crown. For, at some point in time, the different Dominions began to develop their own individual interests which were not necessarily identical with the common interest of the Crown. The inter se doctrine, which was applicable to treaties in Heads-of-States form, suffered serious eclipse in significance even as the Dominions began to negotiate their own treaties in inter-governmental form.

The challenge of this doctrine by the Irish Free State in 1924, by registering with the League of Nations the Articles of Agreement of 1921, which was purported to be beyond the reach of international legal regulation, only demonstrated that (1) Ireland wished to treat itself as an entirely new State,



and (2) that the inter se doctrine could no longer be treated as a valid proposition of imperial constitutional law, at least with respect to Ireland. This general development has given rise within the British Commonwealth system, to the current practice of concluding devolution agreements with the new Commonwealth Countries which gained their independence after the Second World War. It should also be added that the doctrine of the indivisibility of the Crown was rendered otiose, and difficult to justify, when, during the Second World War, the Crown acted somewhat inconsistently on the advice of the Ministers of the self-governing Dominions. The Irish Free State insisted upon its right to remain neutral in the war. A motion to adopt a similar policy was narrowly defeated in the South African Parliament in 1939. Canada and South Africa declared war on Germany independently of Great Britain. And while Australia and New Zealand regarded themselves as being at war by virtue of the British declaration of war, Australia was later to adopt an independent policy of declaring war on Japan in 1941.<sup>139</sup> These questions are significant in so far as they profoundly affected the British constitutional law concept of the Crown as well as the inter se doctrine which was intended to insulate the relations of the Commonwealth

---

<sup>139</sup> O'Connell, "The Crown in the British Commonwealth", 6 I.C.L.Q. (1957) pp. 116-118.



countries from the operation of international law.<sup>140</sup> They are equally important in so far as they have had some impact on the problem of subrogation to treaties in the Commonwealth countries.

Despite the marked contrast between the British and French approaches to the problem of treaty succession in the countries of their former spheres of influence, the practice of the new States themselves leaves little room for a discussion of how much their respective attitudes are attributable solely to the legal or political legacies of their former administering authorities. While Britain did not think it important to conclude devolution agreements with the older Dominions, France seemed to have attached considerable weight to this technique of formal transfer of treaty rights and duties with respect to her protectorates.<sup>141</sup> On the other hand, the British employed this technique more commonly after the Second World War, whereas the practice was almost never continued relative to the ex-French African States. But the importance attached by the new States themselves to the existence of devolution agreements is to be explained less on the basis of the mere existence of such agreements than on their actual practice after independence. As has already been

---

<sup>140</sup> Fawcett, The Inter Se Doctrine of Commonwealth Relations (1958) p. 48; The British Commonwealth in International Law (1963) p. 144.

<sup>141</sup> Morocco, Laos, Cambodia and Vietnam, discussed above.





pointed out, practice is on the whole inconsistent; some have acknowledged succession to certain treaties while denying it in respect of others. In so doing, the number and character of treaties selected by each new State appear to be governed less by the terms of any devolution agreements that may have existed than by considerations of national policy, and more particularly by the nature and objective of each such treaty.

In the International Law Commission debate on the law of State succession, some of the new States found an opportunity to question the legal validity of the devolution treaties, insinuating that they may have been imposed by "duress" by the retiring imperial power, and that their acceptance of them was the price which they had to pay for their independence.<sup>142</sup> It was further stated that "if a devolution treaty so limits the sovereignty of a new State that the relationship it creates does not differ substantially from the former colonial relationship..., the treaty in question will violate the rule of international law which prohibits colonialism in all its forms and manifestations and is therefore void and voidable".<sup>143</sup> Thus, by implication, devolution treaties appear theoretically to be assimilated to the category of "unequal treaties", which the new States regard as void ab initio, on the ground that they are calculated to enshrine and protect the "predatory interests"

---

<sup>142</sup> See, e.g., GAOR, 23rd Sess., Suppl. No. 9 (A/7209/Rev.1) p. 28, para. 70.

<sup>143</sup> Ibid.; See G.A. Res. 1514 (XV), December 14, 1960.



of the colonial powers. It is submitted that this particular conception of the inheritance agreements may well be one of the crucial determinants of the policy attitudes of the new States towards the problem of State succession in general.

As to the legal effect of the devolution agreements, E. Lauterpacht has written that

the correct interpretation of the situation arising from the conclusion of an inheritance agreement is that third States are entitled to regard it as an offer by the new State to remain bound, subject to certain conditions and limitations, by the commitments of its parent. The result of the acceptance by a third State of this offer is, in effect, to create a new, unwritten, treaty in the terms of the treaty concluded with the parent State.<sup>144</sup>

McNair regards them as "an attempted novation (which) assume the consent of the other parties to those treaties..."<sup>145</sup> Mann<sup>146</sup> and Lester<sup>147</sup> agree that for an assignment of treaty rights to occur, the consent of the contracting parties is necessary. On the other hand, Van Panhuys<sup>148</sup> has argued that novation may be presumed when a new State is recognized by the third State. Professor O'Connell maintains that "the devolution

---

<sup>144</sup> "State Succession and Agreements for the Inheritance of Treaties", 7 I.C.L.Q. (1958) pp. 525-26.

<sup>145</sup> McNair, The Law of Treaties (1961) p. 650.

<sup>146</sup> Mann, "The Assignability of Treaty Rights", 3 B.Y.I.L. (1953) p. 475.

<sup>147</sup> A.P. Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 505.

<sup>148</sup> Van Panhuys, "La Succession de L'Indonesie aux accords internationaux...", 2 Nederlands Tijdschrift voor Internationaal Recht (1955) p. 67; see also Green, 32 Saskatchewan L.R. (1967) p. 104.



agreements are confirmatory of a general succession to treaties under international law, and are intended mainly to put other parties on notice of the successor State's affirmative policy".<sup>149</sup> In view of the fact, however, that the new States have not adhered closely in practice to the list of treaties covered by devolution agreements when selecting those to which they acknowledge succession, it is difficult to see how the proposition of a presumption of general succession based upon the existence of inheritance agreement can be successfully maintained.

What is the attitude of third States? Do they regard the inheritance agreement as automatically conferring upon the new State rights and duties arising under treaties concluded between them and the predecessor State? McNair, speaking of the ruling by the High Court of Bombay sustaining India's claim to have succeeded to the Warsaw Convention on Air Carriage, 1929, aptly observes that

"it is not difficult to imagine circumstances in which a State might be quite willing to contract obligations of a certain character with the old India but not with the new India or with Pakistan alone".<sup>150</sup>

It is probably safe to say that the practice of States is not very certain. While the United States in its Treaties in Force<sup>151</sup> tends to list treaties against new States on the basis of devolution agreements, Thailand in the case Concerning the

---

<sup>149</sup> State Succession, Vol. II (1967) p. 371.

<sup>150</sup> McNair, op. cit., 650.

<sup>151</sup> See, e.g., Treaties in Force 1962, 1964, 1966.







Temple of Preah Vihear<sup>152</sup> was to argue that the devolution agreement between France and Cambodia was in any event a res inter alios acta, and could have no binding effect on third parties without their consent. While, of course, it is possible to argue that silence on the part of third States could lead to a presumption of novation, the position adopted by Thailand in the above case suggests that mere silence cannot always be construed as a basis of novation.

The commitment of the United Nations to the "progressive development and codification of international law" has led to the belief that if new rules of international law could be formulated with the consent of the great majority of States, it is possible that the authority of international law could be vastly enhanced, and States would be more likely to conform their international conduct to the prescribed legal norms. Thus, on several occasions, some members of the new States in the International Law Commission and in the Sixth Committee of the General Assembly, have proposed the transformation into legal rules of subject-matters of a high political complexion.<sup>153</sup> The result in such cases has been the absence of a settled rule with an objectively binding force.

However, the efforts of the I.L.C. to "develop and codify"

---

<sup>152</sup> I.C.J. Rep. (1961) p. 17; Oral Proceedings, p. 27.

<sup>153</sup> E.g., G.A. Res. 1514 (XV) of December 14, 1960 on the Granting of Independence to Colonial Countries and Peoples; Peaceful Co-existence or "The Principles of Friendly Relations and Co-operation among States", U.N. Doc. A/5746, Nov. 16, 1964



the law of treaties have also brought into sharp focus the  
 154  
 problem of the legal regulation of State succession to treaties.  
 As it stands now, the problem is still far from settled. The  
 above investigation of both the theory and practice of State  
 succession in respect of international treaties in the new  
 States formerly under the British and French colonial systems,  
 confirms the "fluidity" of the law of State succession. The  
 whole question, as seen from the point of view of the new  
 States, seems to have become a problem of legal policy. And,  
 as in any other question of policy, the solution involves a  
 decision upon the objectives - upon the ends and means - and  
 this may be little related to the prevailing legal doctrine.

---

 154

The International Law Commission, at its first session in 1949, listed "Succession of States and Governments" among the fourteen topics selected for codification (I.L.C. Yearbook, 1949, p. 279). However, it was unable to deal with this topic until its 14th session held in 1962, during which, in keeping with General Assembly resolution 1686 (XVI) of 18 December, 1961, the Commission decided to give priority to the study of the problem of succession in its future programme of work. (I.L.C. Yearbook, 1962, Vol. 2, p. 190). To expedite matters, a Sub-Committee on the Succession of States and Governments was set up, charged with the function of determining the scope of the subject and the method of approach for the study. However, subsequent reports of the Commission have revealed a wide divergence of views among its members not only with regard to the specific criteria to be employed, but with respect to the fundamental question of whether the law of State succession is at all amenable to codification. See, eg. the Sub-Committee's first report on "Succession in Respect of Treaties", U.N. Doc. A/CN.4/202 of 1 July, 1968; I.L.C. Yearbook, 1968, Vol. I, p. 130. See also GAOR., 23rd session, Suppl. No. 9(A/7209/Rev. 1) (Report of the I.L.C.).



## CHAPTER IV

### SUCCESSION TO MULTILATERAL TREATIES

#### 1. Introductory

There seems to be a general inclination on the part of the new States to acknowledge succession to certain multilateral conventions of economic, administrative and humanitarian importance. Theoretically, this furnishes a strong ground for the oft-asserted proposition that multilateral treaties of "a legislative character" devolve automatically upon a new State, or at least should be so regarded on account of the specific 'legislative element in such instruments'. Thus, Dr. Jenks, in an authoritative article on "State Succession in Respect of Law-making Treaties", reaches the conclusion that "just as treaty provisions creating local obligations are to be regarded as having the character of executed conveyances rather than that of contractual provisions which continue to be executory, so obligations under legislative instruments should be regarded as obligations under the law rather than as contractual obligations".<sup>1</sup> In his view, the sociological facts of contemporary international life have brought about revolutionary changes in the subject-matter of international law which, coupled with "the economic and strategic need of an industrialized world

---

<sup>1</sup> C. Wilfred Jenks, "State Succession in Respect of Law-making Treaties", 29 B.Y.I.L. (1952) p. 142.





community", prompts the view that the traditional doctrine that a new State starts life with a clean slate in so far as the treaty obligations of its predecessor are concerned is no longer adequate for the mid-twentieth century world. On the contrary, "the widely felt and urgent needs of a developing international society, both its authority as a legal system and the prospect of developing a peaceful international order" favour the contention that multilateral "law-making" treaties survive changes of sovereignty.<sup>2</sup> He further argues that if the principle is accepted that a new State is bound by existing rules of customary international law, there is no reason why, "now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new State should be regarded as starting with a clean slate in respect of rules which have a conventional rather than a customary origin".<sup>3</sup> This argument merely assumes that "multipartite legislative instruments" are the same as customary international law, and hence automatically binding upon all new members of the international society. What seems to be ignored is the fact that a treaty - whether bilateral or multilateral - is a contract and is binding only upon parties to it.

Professor O'Connell, while recognizing the desirability of continuity of treaty obligations, criticizes Jenks' criterion

---

<sup>2</sup> Ibid., pp. 108, 110.

<sup>3</sup> Ibid., p. 107.



of transmissibility on the ground that the concept of a multi-lateral "legislative" treaty is somewhat misleading. In his view, "a treaty, no matter what its form or subject-matter, is always a contract, and the problem is one of succession to contractual rights and duties rather than birth into a legislative regime".<sup>4</sup> A treaty may be described as "law-making" when it is binding not only upon its parties but also upon non-signatories; in that case, "it is not the treaty itself which creates the law...but the transformation of its essential provisions into normative customs".<sup>5</sup> Accordingly, he maintains that treaties devolve "not because of their legislative characteristics, but because of their subject-matter".<sup>6</sup>

Vitta<sup>7</sup> and Zemanek<sup>8</sup> acknowledge that multilateral conventions are increasingly being regarded as legislative on account of the normative character of the rules they create, but doubt that even so they are binding on non-parties. Zemanek insists that the principle of mutuality is essential to all treaty-making; the notion of automatic succession, there-

---

<sup>4</sup> O'Connell, State Succession, Vol. 2 (1967) p. 213.

<sup>5</sup> Ibid., p. 212.

<sup>6</sup> Ibid., p. 213.

<sup>7</sup> Vitta in Annuaire francais (1960) pp. 225-228.

<sup>8</sup> Zemanek, "State Succession after Decolonisation", 116 Hague Recueil (1965) p. 187 et. seq.



fore, constitutes a violation of this principle.<sup>9</sup> Bartos recognizes the general trend towards succession, but maintains that the new State must retain the right of option.<sup>10</sup> Dr. Zourek states that since "every sovereignty is obtained in an original way... the rights and obligations of the predecessor emanating from international law, cannot pass on the newly emerging State, unless such new State takes them over by its own decision, or unless it can be proved that it is obliged to assume them under general international law".<sup>11</sup>

Seeing that there is a clear tendency for new States to acknowledge the continuity of multilateral conventions, one may be tempted to dismiss the above arguments as largely a quarrel over words, yet this would in no way resolve the problem. What is at stake is more than just a question of terminology, for it may well impinge upon an important principle of treaty law, namely, that a treaty, being based upon agreement, cannot affect the law which applies to States which do not become parties to it. This is the rule, pacta tertiis nec nocent nec prosunt, and it applies not only to bilateral treaties but also to multilateral conventions. The concept of a "legislative multilateral instrument" would seem to imply an exception to this rule. Writing on the general problem posed

---

<sup>9</sup> Ibid.

<sup>10</sup> U.N. Doc. A/CN.4/160, Annex II, Appendix, p. 15.

<sup>11</sup> Zourek in I.L.A., The Effect of Independence on Treaties (1965) p. xv.





by the notion of international legislation to the task of developing and codifying international law, Professor Jennings states that

there is no authoritative body which can lay down general norms not sanctioned by the common agreement of States... The all too common use of the term 'international legislation'<sup>12</sup> in connexion with general treaties is therefore to be deplored; for not only does it give an altogether misleading impression of the condition of the international society, but it further tends to propagate a dangerous complacency by obscuring one of the most obstinate of the difficulties with which the international lawyer has to contend. The truth of the matter is that the general law-making treaties differ from particular treaties only in degree and not in kind. Even the general treaty is law only for the parties to it.<sup>13</sup>

This general position of the law requires the qualification that, although a treaty, whether bilateral or multilateral, is binding only on the parties to it, third States not parties to the treaty will be bound by identical rules if in fact it is declaratory of existing customary law.<sup>14</sup> But, as already pointed out, the rules so declared derive their binding force not from the treaty itself but from customary law. Those committed to the negative school of thought, perhaps basing their contention upon the traditional view of the law, consistently argue that in so far as the succeeding States are

---

<sup>12</sup> Manley O. Hudson defines "international legislation" as "the process and the product of the conscious effort to make additions to, or changes in, the law of nations". International Legislation, Vol. 1, p. xiii.

<sup>13</sup> Jennings, "The Progressive Development of International Law and Its Codification", 24 B.Y.I.L. (1947) p. 304.

<sup>14</sup> Ibid.



concerned, treaties of their predecessors are res inter alios acta.<sup>15</sup> It appears difficult, however, to state with finality any specific legal doctrine which could be said to be accepted by the new States as a common guide to the problem of succession to multilateral treaties. Since multilateral conventions are often open to accession, it is not uncommon for the new States to deposit instruments of accession to such conventions, thus sidestepping the whole issue of succession. This in their view would seem to signify expression of their free will, as sovereign States, to be bound by such treaties. On other occasions, it is equally common for a new State to declare itself a successor in principle to its predecessor's rights and duties arising under multilateral conventions which were applied to its territory while it was still dependent. For the practice of the new States, we shall now turn to international conventions of which the Secretary-General of the United Nations is the depositary.

## 2. Succession to Multilateral Conventions of Which the Secretary-General is Depositary

In the practice of the United Nations, the Secretary-General, in exercising the depositary functions, has allowed himself to be guided chiefly by the relevant provisions of the specific international conventions in inviting a new State to

---

<sup>15</sup> Castren, "Obligations of States arising from the Dismemberment of Another State", 13 Zeitschrift fur Ausländisches Recht und Volkerrecht (1951) pp. 753-54; Lester, 12 I.C.L.Q. (1963) p. 475 et. seq.



become a party to such conventions. Some of the agreements contain territorial application clauses, but these vary from convention to convention. While some provided for optional application of the convention to the former colonies of the predecessor States, others provided for optional exclusion of such territories from the application of the convention. Still others made the application of such conventions in the territory of the non-metropolitan State dependent on whether or not the previous consent of that territory was required by domestic law.<sup>16</sup> This posed no small problem to the depositary with regard to the formulation of a definitive policy to guide the action of the Secretariat, especially as an increasing number of dependent territories acquired full independence after the Second World War. In 1949, the problem concerning the succession of the emerging States to the multilateral conventions was stated by the Secretariat as follows:

As the protocols amending former conventions provided that they were open for signature only to the States Parties to those conventions, the question has arisen whether the new States should be regarded as Parties to the conventions in virtue of the undertakings assumed by the Powers which were formerly responsible for their administration.

Admittedly, the treaties or instruments establishing the independence of a new State usually deal with the problem of that State's succession to international rights and obligations. Nevertheless, it had to be determined whether the new State had to notify the Contracting Parties expressly in writing that it considered itself bound by the conventions covering those rights and obligations.

---

<sup>16</sup> ST/LEG/7, p. 47.







Actually, the protocols amending former conventions were signed by the new States to which the conventions were applicable in virtue of declarations made by the Powers which formerly had authority over those territories. In view of the clause limiting to certain States the right to become Parties to the protocols, signature by the new States constituted an implicit acknowledgment vis-a-vis the international community that they regarded themselves as still bound by the conventions in question. In some cases, moreover, an express declaration to this effect was made under the signature of the State concerned.<sup>17</sup>

Clearly, this statement of policy was designed to achieve legal substitution on the widest possible scale, but it was based on no consistent principle as a result of the differing character of the multilateral conventions with which the Secretary-General had to deal. If anything, the depositary's initial approach was based upon a presumption of novation, particularly where the convention in question contained a territorial application clause. Yet, in the last analysis, the Secretary-General acted in deference to the wishes of the new State, for practice was not only based upon "the nature of the clauses in the treaties in question" but also upon "the interpretation placed on those clauses by the parties concerned".<sup>18</sup> The normal procedure is for the Secretary-General to send a list of the multilateral conventions of which he is the depositary

---

<sup>17</sup> U.N. Doc. 1949, V. 9, Signatures, Ratifications, Acceptances, Accessions, etc., covering the Multilateral Conventions and Agreements in respect of which the Secretary-General Acts as Depositary, pp. 3-4.

<sup>18</sup> ST/LEG/7, p. 51.



to each new State, asking it to declare its attitude.<sup>19</sup> The purpose of this is to consider each new State as a party in its own name to the treaty concerned. This method has not, however, proved very effective in eliciting the desired response from the new States.

On the other hand, where the treaty contained no territorial application clause, "the depositary has... to draw certain conclusions from the nature of the treaty and, if necessary, from the travaux preparatoires, and from practice".<sup>20</sup> Frequently, action in such cases is based upon the assumption that the treaty was automatically applicable to all the dependent territories of every party. In the case of such treaties, however, it is possible that the new State may decline to recognize itself as bound on the ground that the treaty was never promulgated as part of the internal law of the territory. Thus, in regard to the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on February 13, 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the General Assembly on November 21, 1947, the Secretary-General decided as a matter of principle that, in view of their nature, these Conventions should be regarded as applying to the territories for the international relations of which the acceding States

---

<sup>19</sup> U.N. Doc. A/CN.4/150, paras 133-134.

<sup>20</sup> ST/LEG/7, para. 98.



were responsible. Accordingly, in his letter of July 16, 1962, the Secretary-General sent to the Congo (Kinshasa) copies of the instruments by which Belgium had extended to its territory certain treaties on which the Congo had not yet declared its position. But in a reply dated May 7, 1962, and received by the Secretary-General on August 13, 1962, the Government of the Republic of the Congo, while acknowledging itself bound by the 1948 Protocol on Drugs, stated in reference to the above mentioned Conventions:

The Government of the Congo cannot consider itself bound by the Convention on the Privileges and Immunities of the United Nations... Although this Convention has been ratified by Belgium, there is no provision in the law of the Congo under which it could be applied to this country. In any event, it does not appear to have been applied to the Congo before the latter attained independence. It does not seem to contain any provision for its automatic entry into force in the dependent territories of acceding States...<sup>21</sup>

The letter further notified the Secretary-General that research was continuing to ascertain whether the remaining treaties about which the Congo had not yet indicated its position had ever been published by Belgium in the legislation of the Congo. Similarly, the Government of the Ivory Coast, by its letters of May 10, June 22, and December 7, 1961, informed the Secretary-General that Ivory Coast considered itself bound by all the treaties listed with the exception of the 1953 Convention on the Political Rights of Women, because this had never been applied by France to the Ivory Coast. It may also be added that Tunisia,

---

<sup>21</sup> U.N. Doc. A/CN.4/150, para. 74.





which recognized itself bound by the Convention of July 28, 1951, relating to the Status of Refugees (this having been ratified by France on its behalf on June 23, 1954), and acceded on November 8, 1957, to the Convention on Road Traffic of September 19, 1949, has not considered itself bound by the Convention on the Privileges and Immunities of the United Nations.

In the evolution of the practice of the Secretary-General regarding the succession of new States to the multilateral treaties of which he is the depositary, great importance has come to be attached, for administrative reasons, to any agreements concerning devolution of international rights and obligations which may have been concluded between the predecessor and the successor States as part of the independence arrangements. On attainment of independence such devolution agreements are registered with the Secretariat and published in the United Nations Treaty Series. Not infrequently, as will be shown, the new States have made reference to these agreements in seeking recognition as parties to existing multilateral treaties entered into by their parent States. Similarly, third States, as, for example, the U.S., have on certain occasions referred to these agreements as a possible basis on which to treat as operative between themselves and the new States treaties previously concluded with their predecessor States.

Thus Pakistan explicitly relied upon the provisions of the Indian Independence (International Arrangements) Order, 1947, when accepting the terms of the Hague Conventions on Conflict of Nationality Laws and on a Certain Case of Statelessness, and



also when signing the Protocol amending the 1923 Convention on the Suppression of Obscene Publications.<sup>22</sup> Similarly, Ceylon declared on April 1, 1957, that it considers itself to be a party to the International Air Services Transit Agreement "since May 31, 1945 (the date of the United Kingdom acceptance) under the terms of the External Affairs Agreement between the United Kingdom and Ceylon of November 11, 1947".<sup>23</sup>

It should be noted, however, that there are other occasions on which successor States give notice that they regard themselves as bound by multilateral treaties concluded by the predecessor States but make no mention of any agreement relating to the inheritance of treaty rights and obligations. Indonesia, for instance, gave notice that she regarded herself as bound by the Berne Copyright Convention, 1890, the Convention on the Protection of Industrial Property and by the Load Line Convention, 1930.<sup>24</sup> Cambodia and Vietnam have acknowledged that they consider themselves bound by the Convention on the Safety of Life at Sea in virtue of its application to Indo-China on November 15, 1938.<sup>25</sup> Ceylon stated that it is applying the Dangerous Drugs Convention of 1925,<sup>26</sup> and Malaysia has notified that it considers itself

---

<sup>22</sup> U.K.T.S., No. 6 (1958), Cmnd. 368, pp. 33, 34.

<sup>23</sup> U.K.T.S., No. 73 (1957), Cmnd. 386, p. 2

<sup>24</sup> U.K.T.S., No. 105 (1951), Cmd. 8447, pp. 3, 5; U.K.T.S., No. 6 (1958), Cmnd. 368, p. 30.

<sup>25</sup> U.K.T.S., No. 105 (1951), Cmnd. 8447, p. 8.

<sup>26</sup> U.K.T.S., No. 73 (1957), Cmnd. 386, p. 7.



bound by the General Convention on the Privileges and Immunities of the United Nations.<sup>27</sup> Yet in none of these communications do the new States appear to have made any reference to the terms of the devolution agreements. Indeed, they have not generally filed a uniform acceptance of treaties of which the Secretary-General is the depositary and to which their predecessors were parties. On the whole, they have indicated their willingness to be considered as successors only when specific decisions were called for. An example is when they are asked to become parties to amending protocols.<sup>28</sup>

Notwithstanding the doubtful legal value of these agreements in terms of their constitutive effect with respect to succession to treaty rights and obligations,<sup>29</sup> the depositary has utilized them as a significant additional guide in the formulation of the Secretariat's policy respecting the transfer of rights and duties under multilateral conventions. In the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements, published on August 7, 1959, the policy of the Secretary-General is outlined, inter alia, as follows:

The Secretary-General, in performing his functions as depositary, has paid the closest regard to these clauses (devolution clauses) while respecting the interpretation placed upon them by the parties.

---

<sup>27</sup> Ibid., p. 20.

<sup>28</sup> ST/LEG/7, p. 61.

<sup>29</sup> See, e.g., E. Lauterpacht, 7 I.C.L.Q. (1958) pp. 524-530; McNair, The Law of Treaties (1961) p. 653; Lester in 12 I.C.L.Q. (1963) p. 503 et. seq.





In addition, it has been found in practice that most new States acknowledge themselves to be bound by a number of agreements previously applied in their territory by the State formerly responsible for their external relations. This practice, however, has not been uniformly followed; most new States, while acknowledging themselves bound by certain agreements, have formally acceded to others which had also been applied in their territory. The Secretary-General has not felt that as depositary he could refuse to accept such instruments, which are an express manifestation of the new State's will. However, where the treaty of independence contains a devolution clause and this clause is precise, he has inserted in the relevant Secretariat publications, against the name of the new State, a reference to the agreements previously applicable to its territory, and has in such cases invited the Government of the new States to become parties to any protocols amending such agreements. Furthermore, if a precise and explicit devolution clause concerning the rights and obligations arising out of international conventions accepted by the State then responsible for the external relations of the new State's territory is the subject of a specific agreement concluded between the two States concerned, and if that agreement is registered with the Secretariat, the Secretary-General considers the new State to be bound by such conventions without having to transmit any notification on the subject. Moreover, the publication of the devolution agreement in the United Nations Treaty Series and the inclusion of the new State in the Secretariat publication Status of Multilateral Conventions among the States parties to conventions previously applied in its territory gives the States concerned all the information they require.<sup>30</sup>

While the existence of a devolution agreement may permit an attitude favourable to automatic novation, the policy of the Secretariat is flexible enough to allow each case to be dealt with on an ad hoc basis. This appears to be supported by the varied forms of standard letter which the Secretary-General writes<sup>31</sup> to each new State on admission to membership in the United Nations, inviting it to notify its position regarding the

---

<sup>30</sup> ST/LEG/7, pp. 61-62.

<sup>31</sup> See U.N. Doc. A/CN.4/150; I.L.C. Yearbook 1962, Vol. 2, p. 122.



treaties of which the U.N. is the depositary. It is submitted that the wide latitude allowed the new States to declare their attitude towards succession to multilateral treaties results not from the application of a general rule of international law, but rather from the absence of any such rule. Furthermore, it reflects the predisposition of the Secretariat to respect the sovereignty of the newly independent State.

### 3. Practice of the New States with Regard to Treaties of Which the Secretary-General is Depositary

The pattern of practice of the new States regarding succession to these treaties is undulatory. While the majority of them are favourably disposed towards succeeding or acceding to existing multilateral treaties, and are generally encouraged by the Secretary-General to do so, their choice of the treaties would appear to be purely a matter of interpretation, which no doubt involves a certain degree of arbitrariness. Thus a new State's specific attitude may be said to be motivated as much by a wide diversity of political considerations as by the humanitarian, technical or administrative character of the treaty in question. Even when Algeria,<sup>32</sup> Upper Volta<sup>33</sup> and Israel<sup>34</sup>

---

<sup>32</sup> See Algerian Delegate's statement, GAOR, 17th sess., 6th Cmttee., 742nd Mtg., para. 14.

<sup>33</sup> U.N. Doc. A/CN.4/150, para, 111 (December 10, 1962).

<sup>34</sup> U.N. Doc. A/CN.4/19; I.L.C. Yearbook, 1950, Vol. 2, pp. 206-218; U.N. Doc. A/CN.4/150, p. 110, para, 30, (December 10, 1962).



have explicitly opted for the clean slate principle, they have in practice acknowledged the continuity of certain conventions which were applied to their territory. Algeria has acceded to eleven of the twenty-five multilateral conventions ratified on her behalf by France. Upper Volta in a letter to the Government of Switzerland, as depositary of the four 1949 Geneva Conventions for the protection of war victims, a copy of which was transmitted to the Secretary-General of the United Nations, declared that the four Conventions "apply by law to the territory of the Republic of the Upper Volta in virtue of their ratification by France on 28 June, 1951".<sup>35</sup> Israel informed the Secretary-General that its policy is "based upon non-recognition by the Government of Israel of any automatic "succession" to the treaty obligations of Palestine, coupled with a willingness to examine that treaty position and to accede de novo to such international treaties as were found to be appropriate, whether or not the mandated territory of Palestine was previously bound by them".<sup>36</sup>

---

<sup>35</sup> U.N. Doc. A/CN.4/150, p. 119, para. 112 (December 10, 1962).

<sup>36</sup> ST/LEG/SER.B/14, p. 42, para. 11.

At least in connection with war criminals, which perhaps provided a basis for the trial of Eichmann, it has been observed that the contention of retroactive legislation could be rejected on the ground that "Israel is in fact a successor to the Mandatory Power in Palestine and, therefore, far from creating new rights for herself after the commission of the offences, she was merely taking over rights and jurisdiction which already existed", L.C. Green, "The Maxim Nullum Crimen Sine Lege and the Eichmann Trial", 38 B.Y.I.L. (1962) pp. 465-466.







The Central African Republic, Congo (Brazzaville), Ivory Coast, Ghana, Malaysia (formerly Malaya), Morocco, Nigeria, Sierra Leone, Syria and the U.A.R. have all accepted succession in principle, but have in practice only done so in relation to specific conventions.<sup>37</sup> On the other hand, Cameroon, Congo (Kinshasa), Cyprus, Dahomey, Guinea, Malagasy Republic, Mali, Senegal, Tanganyika (now Tanzania), Togo and Tunisia, while acknowledging succession to only some of the applicable conventions, have in other cases chosen to accede to those conventions which had been extended to their territories by their predecessor States.<sup>38</sup> Somalia,<sup>39</sup> Mauritania,<sup>40</sup> Gabon<sup>41</sup> and Chad<sup>42</sup> have so far declared no position of principle concerning succession to the multilateral conventions of which the Secretary-General is the depositary. But they all have recognized that they continue to be bound by certain conventions of the International Labour Organization.

After the formation of the United Arab Republic by the Union of Egypt and Syria, following the plebiscite of February 21, 1958,

---

<sup>37</sup> I.L.C. Yearbook, Vol. 2, 1962, pp. 109 et. seq.

<sup>38</sup> U.N. Doc. A/CN.4/150.

<sup>39</sup> Ibid., para. 106.

<sup>40</sup> Ibid., para. 114

<sup>41</sup> Ibid., para. 81.

<sup>42</sup> Ibid., para. 65.



the Foreign Minister of the Republic in a communication to the Secretary-General,<sup>43</sup> dated March 1, 1958, declared:

It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

On the strength of this letter, the Secretary-General listed the U.A.R. in the Status of Multilateral Conventions<sup>44</sup> as a party to all the treaties to which Egypt or Syria had been parties before the Union was established. Under the name of the Republic, it was shown whether Egypt or Syria or both had taken action regarding the treaty in question.

At the time of her independence, Indonesia entered into a devolution agreement with the Netherlands. This came into force on December 27, 1949. On admission to the United Nations, on September 28, 1950, it addressed a note to the Secretary-General, acknowledging "that the rights and obligations of the Kingdom of the Netherlands arising out of the signature or acceptance of the following Protocols to the General Agreement... are to be considered as rights and obligations of the Republic of Indonesia inasmuch as such Protocols are applicable to the jurisdiction of the Republic of Indonesia".<sup>45</sup> In a subsequent

---

<sup>43</sup> Ibid., para. 48.

<sup>44</sup> U.N. Doc. ST/LEG/3/Rev. 1

<sup>45</sup> U.N. Doc. A/CN.4/150; Yearbook of the I.L.C., Vol. II (1962) pp. 110-111; ST/LEG/7, p. 56.



note to the Secretary-General, dated February 26, 1959, Indonesia listed among others the following agreements which she considered binding on her: Convention Providing for a Uniform Law for Cheques,<sup>46</sup> Convention for the Settlement of certain Conflicts of Laws in connection with Cheques,<sup>47</sup> and Convention on the Stamp Laws in connection with Cheques,<sup>48</sup> all signed on March 19, 1931, at Geneva. On the other hand, Indonesia, in a note verbale of September 16, 1959, was to declare, in respect of the Protocol, signed at the Hague on April 12, 1930, relating to Military Obligations in Certain Cases of Double Nationality<sup>49</sup> that:

The Republic of Indonesia is however of the opinion that all agreements signed by the Netherlands on behalf of or declared to be valid for the former Netherlands East Indies do not automatically apply to the Republic of Indonesia as a successor of the former Netherlands East Indies. The Republic of Indonesia therefore does not consider itself bound by said Protocol.<sup>50</sup>

Other multilateral conventions whose applicability to Indonesia has not been acknowledged include: the Convention for the Suppression of the Manufacture of Opium, 1925; International Opium Convention, 1925; Distribution and Manufacture of Narco-

---

<sup>46</sup> L.N.T.S., Vol. 143, p. 355.

<sup>47</sup> L.N.T.S., Vol. 143, p. 407.

<sup>48</sup> Ibid., Vol. 143, p. 7.

<sup>49</sup> Ibid., Vol. 178, p. 227.

<sup>50</sup> U.N. Doc. A/CN.4/150, para. 21; see also U.N.T.S., Vol. 69, p. 3.





tics Convention, 1931; Obscene Publications Convention, 1910 and 1923; Slavery Convention, 1926; White Slave Traffic Conventions, 1904, 1910, 1921, 1933; and the Economic Statistics Convention of 1928. What is responsible for this discriminatory, seemingly contradictory, policy towards succession to multilateral conventions, even with the existence of a devolution agreement? There is little doubt that Indonesia has tended to apply its inheritance agreement in acknowledging succession to certain international treaties when this has suited its political and economic objectives, but the overall tendency of its policy is pre-eminently in the direction of non-succession. The unequivocal rejection of the concept of automatic succession in the foregoing statement by Indonesia would appear to indicate that even the existence of an inheritance agreement cannot lead lightly to a presumption of automatic subrogation.

#### 4. Succession to I.L.O. Conventions

The practice of the International Labour Organization (I.L.O.) regarding the succession of the new States to international labour conventions has crystallized during the more than twenty years of its existence, and is probably the most consistent of all the international organizations. Strangely enough, when the I.L.O. Constitution was amended in 1946, no provision was made regarding the admission of new States to which international labour conventions had been applied, despite the fact that some colonial territories were already on the verge



of achieving full independence. Article 35(1) of the Constitution of the I.L.O. merely provided that "The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject-matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions". Paragraphs 2 to 6 of the same article detailed further procedures by which international labour conventions could be made applicable in such territories. However, with the emergence of a large number of new States, the I.L.O. has made great efforts to ensure the continued application to such States of the labour conventions which had been previously applied in their territory.

In 1951, the International Labour Conference stated that

In a number of cases Conventions are regarded as binding on Members of the Organisation in virtue of the principle of State Succession... In so far as they may involve any qualifications of the ordinary rules in regard to State Succession they tend to suggest that there are special considerations which give international labour conventions a more durable character than treaty engagements of a purely contractual nature.<sup>51</sup>

Although this statement in itself has no obligatory force, it

---

<sup>51</sup> "Explanatory Note", The International Labour Code 1951, Vol. 1 (1952) p. XCVIII.



seems to represent the growing concern of the Organization with the pressing problem of State succession as a result of the rise of a large number of new States after the Second World War. The I.L.O., deeply committed to the promotion of social justice as embodied in the Preamble to its Constitution, recognizes that an abrupt discontinuity of relevant labour conventions in the territory of a new State on account of its newly acquired sovereignty would indeed be detrimental to the concept of human rights. The view favouring continuity of such conventions irrespective of change of sovereignty is made necessary in view of the wide network of multilateral treaties administered by the Organization. Some 116 conventions affected the former colonial territories, and by 1961, the International Labour Office had been notified of about 3,223 territorial applications, 290 of which had been modified in accordance with the provisions of Article 35 of the I.L.O. Constitution.<sup>52</sup>

The question of succession to international labour conventions began in 1937 with the separation of Burma from India. Burma, though not a non-metropolitan territory within the meaning of Article 35 of the Constitution of the I.L.O., was separated from India on April 1, 1937.<sup>53</sup> It was then administered by the United Kingdom until October 17, 1947, after which it

---

<sup>52</sup> O'Connell, "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 139; Jenks in 29 B.Y.I.L. (1952) pp. 135-136; Wolf in Annuaire francais (1961) pp. 742-51.

<sup>53</sup> See Government of India Act, 1935, 26 Geo. V, C. 2.





applied for admission to the membership of the I.L.O. At the International Labour Conference of June, 1937,<sup>54</sup> the British delegate stated that Burma had now acquired an international status similar to the self-governing territory of Southern Rhodesia, although she still remained an overseas territory of His Majesty. Accordingly, it was notified that Burma would continue to observe and apply all the international labour conventions in which she previously participated as part of India. This position seems to have been accepted by the other delegates to the Convention. However, by a letter of April 19, 1948, the Foreign Affairs Minister of Burma notified the I.L.O. that Burma recognized "that the obligations resulting from the international labour conventions ratified in respect of Burma by India prior to April 1, 1937 continue to be binding upon the Union of Burma in accordance with the terms thereof".<sup>55</sup>

Similarly, after Pakistan seceded from India, by the operation of the Indian Independence Act, 1947,<sup>56</sup> she acknowledged herself bound by the international labour conventions which had been ratified by India prior to August 14, 1947.<sup>57</sup> Following this, Syria, the Philippines, Lebanon, Jordan, Sudan,

---

<sup>54</sup> I.L. Conference, Twenty-third Session, Record of Proceedings (1937) p. 570.

<sup>55</sup> I.L.O. Official Bulletin, Vol. XXXI, No. 3, December 31, 1948, p. 217.

<sup>56</sup> 10 and 11 Geo. VI, C. 30.

<sup>57</sup> I.L.O. Official Bulletin, Vol. XXX, No. 5 (1947) p. 334.



Kuwait and Israel were admitted to membership of the I.L.O., but Israel made it clear that, as a totally new State, she started life completely free of all obligations, owing to the special circumstances under which she had attained her international personality.<sup>58</sup> Ceylon's application for membership also contained an acceptance of the undertaking regarding the application of international labour conventions which had been extended to her territory by the United Kingdom, and further promised to give early consideration to the formal ratification of the relevant conventions covered by the undertaking.<sup>59</sup> Indonesia,<sup>60</sup> Vietnam,<sup>61</sup> Libya,<sup>62</sup> Tunisia<sup>63</sup> and Morocco<sup>64</sup> in their applications gave undertakings in similar terms. But all these statements of principle implied no specific obligation on the part of the States; they merely indicated that the new States were willing to apply those labour conventions which had previously been applied in their territory by the predecessor States.

It was then thought necessary to devise a formula whereby

---

<sup>58</sup> Rosenne, "Israel et les traites internationaux de la Palestine", 77 Journal du droit international (1950) p. 1140.

<sup>59</sup> I.L.O. Official Bulletin, Vol. XXXI, No. 3 (1948) p. 223.

<sup>60</sup> I.L.O. Official Bulletin, Vol. XXXIII, No. 2 (1950) p. 67.

<sup>61</sup> Ibid., Vol. XXXIII, No. 5 (1950) pp. 248-51.

<sup>62</sup> Ibid., Vol. XXXV, No. 2 (1952) p. 85.

<sup>63</sup> Ibid., Vol. XXXIX, No. 2 (1956) pp. 67-68.

<sup>64</sup> Ibid., Vol. XXXIX, No. 2 (1956) pp. 68-69.



a declaration of continuity of I.L.O. Conventions could be secured from a new State on being admitted to membership of the Organization. Under this rule, Ghana, which acceded to independence on March 6, 1957, was admitted in the latter part of that year to membership of the I.L.O.<sup>65</sup> In the form letter, besides indicating the number of I.L.O. Conventions by which they acknowledge themselves to be bound, the new States also undertake to continue to apply certain specified conventions which had been declared to be applicable exclusively in "non-metropolitan territories". The conventions are not equally relevant to all the new States. On the contrary, the nature of choice appears to be dictated by the peculiar needs and conditions of a given territory. For instance, while Ghana undertook to continue to apply "the Right to Association Convention, 1947" (non-metropolitan territories), and "Labour Inspectorates Convention", the Federations of Malaya (now Malaysia) undertook to continue to apply only the "Labour Inspectorates Convention". This approach seems to have been followed by all the other new States which gained their independence in the 1960's. It is to be noted, however, that those conventions which were expressly intended for non-metropolitan territories can be applied by a new State, since it is no longer a non-metropolitan territory, only as a transitional measure, until such a period that it is in a position to ratify

---

<sup>65</sup> Ibid-, Vol. XL, No. 8 (1957) p. 373.





the corresponding convention formerly restricted to the metropolitan countries.

In so far as the succession of the new States is concerned, three classes of the I.L.O. Conventions appear to be involved. The first category includes those which the successor State is required to continue to apply; secondly, those which were modified by the administering authority, but which the successor State must undertake to continue to apply, pending ratification of the "metropolitan" conventions; and thirdly, those intended to maintain "the status quo",<sup>66</sup> the new State undertaking to ratify the convention in full at a later date, particularly if modifications had been reserved.

The above survey shows how the International Labour Organization has sought, as a matter of deliberate policy, to ensure that the continuity of its conventions is not adversely affected by change of sovereignty within the former territories of the colonial authorities. Owing to the underlying humanitarian interests in these conventions, the new States themselves appear to be quite favourably disposed towards this policy. The attitude of the new States was underlined by the expression of support for the I.L.O. practice contained in the resolution adopted at the First African Regional Conference of the I.L.O., held at Lagos, Nigeria, in December, 1960.<sup>67</sup>

---

<sup>66</sup> D. Marchand, "State Succession and Protection of Human Rights", 8 Journal of the Int. Commission of Jurists (1967) pp. 47-48.

<sup>67</sup> See, e.g., Wolf in Annuaire francais (1961) p 742ff.



In spite of the somewhat inflexible approach of the I.L.O. to the question of succession, not all new States, however, were equally willing to make unreserved declarations of continuity. It is well-known that Uganda and Malawi, in keeping with their general temporizing policy regarding succession to treaty obligations of their predecessor, exhibited great reluctance to abide by the accepted practice. It was not until the I.L.O. Committee of Experts on the Application of Conventions and Recommendations brought pressure to bear that Malawi gave assurances of her intention to remedy the situation.<sup>68</sup> It needs also to be added that even those new States which anxiously declared in their letters of application the continuity of I.L.O. Conventions in their territory, have in practice accepted some of those conventions on a selective basis. This would appear to indicate that, in the final analysis, the choice of those conventions is still seen by the new State as a question of policy. This prompts the conclusion that the initial declaration of continuity may well be motivated by its desire to achieve international recognition and acceptance.

##### 5. Succession in Respect of the IMF and IBRD

Properly speaking, the problem of State succession in respect of the IMF and the IBRD appears to be inextricably con-

---

<sup>68</sup> See I.L.O. Report of the Committee of Experts, Report III, Part V, International Labour Conference, 49th sess., Geneva (1965) pp. 23-24.



nected to the question of membership in those Organizations. In this sense, obligations arising under their constituent instruments are necessarily obligations incidental to membership in the organizations, and must be distinguished from obligations deriving from other categories of "law-making" multilateral conventions.<sup>69</sup> It is as well to note that the principle is generally accepted that membership in international organization, being determined by the rules of its constitution, cannot pass to a successor State.<sup>70</sup> But, broadly viewed, whether or not succession occurs remains a question of the interpretation of the relevant constitutional provisions of the organization concerned.

The International Monetary Fund is only peripherally affected by the problem of State succession in so far as territorial changes of member States might imply changes in their voting rights.<sup>71</sup> Article 20(2)(g) of the Articles of Agreement of the IMF provides:

By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority, and all territories in respect of which they exercise a mandate.

---

<sup>69</sup> Jenks, "State Succession in Respect of Law-Making Treaties", 29 B.Y.I.L. (1952) p. 133.

<sup>70</sup> Cf. U.N. Opinion in the case of India and Pakistan, GAOR, 2nd sess., 1st Cmttee., p. 582, Annex 14g; U.N. Doc. A/CN.4/149, p. 8; U.N. Doc. A/C1/212.

<sup>71</sup> Aufricht, "State Succession under the Law and Practice of the International Monetary Fund", 11 I.C.L.Q. (1962) pp. 154-162.





Since membership is associated with certain voting rights together with the quota and borrowing privileges, it follows that any constitutional changes of a radical kind within a State member are likely to have some effect on the character of those rights. Consequently, the Fund is required to take notice of any such changes in so far as they touch upon the status of a member State. In general, where the problem of succession is involved, the I.M.F. has allowed itself to be guided by the action of the United Nations. When India was partitioned, she transmitted a copy of her devolution agreement to the Fund, and, taking cognizance of the United Nations decision concerning India's membership, the Fund's Committee on membership recommended to the various Governments that India be treated as British India and hence as the original member of the Fund. Thus India's existing quota rights were maintained. On the other hand, Pakistan was required to apply for membership in accordance with the terms and conditions of the Membership Resolution of February 1, 1950. Pakistan's quota was then determined independently by the Board of Governors of the I.M.F.<sup>72</sup>

In the case of the formation of the United Arab Republic by the Union of Egypt and Syria in 1958, the problem arose as to the substitution of the U.A.R., a single member, for the originally separate membership of Egypt and Syria. This, of

---

<sup>72</sup> I.M.F. Summary of Proceedings, 5th Annual Meeting of the Board of Governors (1950) p. 51.



course, involved a re-assignment of voting rights.<sup>73</sup> Egypt as a single member of the Fund possessed 850 votes, while Syria had only 315. The question was whether the combined figure of 1165 votes should be assigned to the U.A.R. or whether an entirely new number of votes should be fixed. It was, however, decided that the U.A.R., as a single member, should now have 915 votes as against the previous separate voting figures of 850 and 315. This decision was based upon the provisions of Article 12(5)(a) of the Fund's Articles of Agreement.<sup>74</sup>

The International Bank for Reconstruction and Development works in close co-operation with the I.M.F., and as such its practice coincides with that of the I.M.F. Under Article 2 (1)(b) of its Constitution, membership of the Bank is restricted to members of the Fund. Thus, in case of State succession, the carrying out of loan agreement would appear to be governed by the Membership Resolution of the Board of Governors of the Fund.<sup>75</sup> Nevertheless, obligations of members in the Bank have no direct connection with those of members of the Fund, even though under the terms of Article 2(1)(a) of the Articles of Agreement "The original members of the Bank shall be those members of the International Monetary Fund". Many of the new States,

---

<sup>73</sup> Aufricht, loc. cit., p. 160; O'Connell, 38 B.Y.I.L. (1962) p. 136.

<sup>74</sup> This stipulates that a member shall have 250 votes plus one additional vote for each part of its quota equivalent to 100,000 United States dollars.

<sup>75</sup> Cf. note 69 above.



including Ceylon, Cyprus, Ghana, Indonesia, Israel, Laos, Nigeria, Sudan, Tunisia and Philippines, have joined both the IMF and the IBRD since becoming independent.<sup>76</sup>

#### 6. Practice of ICAO Respecting Successor States

The International Civil Aviation Organization came into existence under the authority of the Chicago Convention of December 7, 1944.<sup>77</sup> Its basic purpose is the regulation of international air traffic. This Convention establishes the international aviation code and stipulates the obligations attaching to membership in the ICAO. Article 2 defines the geographic scope of the operation of the Convention as comprising "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such a State". No reservation by a contracting State was permitted regarding the exclusion of a dependent territory from the application of the Convention. Thus, the convention was extended by the contracting metropolitan States to all their non-metropolitan territories. Article 5 of the Chicago Convention lays down that aircraft of a contracting State engaged in non-scheduled international air services have the right to fly over, and to make non-traffic stops in, the territory of any other contracting State. Such aircraft also have the privilege

---

<sup>76</sup> See Annual Reports of the IBRD for 1960, 1961, 1962 and 1963.

<sup>77</sup> U.N.T.S., Vol. 15, p. 295; Hudson, International Legislation, Vol. 9, p. 168.





of taking on or discharging passengers, cargo or mail in any contracting State. Similar rights are granted to scheduled flights under Article 1 of the International Air Services Transit Agreement, signed at Chicago on December 7, 1944. Additional privileges are accorded under the terms of Article 1 of the International Air Transport Agreement also concluded on December 7, 1944 at Chicago.

Clearly, then, the Chicago Convention on International Civil Aviation is one of those treaties whose scope of operation affects the domestic jurisdiction of many States. Membership in the ICAO can be acquired by mere ratification of, or adherence to, the Chicago Convention in accordance with Article 92. Thus, a new State can become a member of the Organization by filing an instrument of adherence, or of ratification, with the Government of the United States, who is the depositary of the Convention. But adherence to the Convention does not automatically include ratification of the amendments to the Convention which have been approved by the Assembly, and which came into force prior to such adherence. The Secretary-General of the ICAO, on receiving from the depositary notification regarding the adherence of a new State, forwards to such a State certified copies of all protocols of amendments, whether or not in force, requesting the new State to indicate whether it wishes to ratify any or all of the amendments.

The problem of the effect of change of sovereignty upon the air law conventions of the ICAO relates to whether, in view of the extension by the contracting States to the non-metropolitan



territories of the Chicago Convention, these air law conventions remain binding upon the new States. Does a new State which previously formed part of the contracting State's territory, after acquiring sovereignty, remain ipso jure a party to the Chicago Convention, and therefore bound by its provisions? The question of succession to these conventions seems particularly important since failure to apply the relevant rules of the conventions in the territory of a new State, even for a short period of time, might well disrupt or hamper the regular functioning of the air services. This would no doubt be the case if a new State previously affected by these conventions, adopted, on achieving independence, the clean slate policy with respect to all the treaty obligations of its predecessor.

Dr. Reni Mankiewicz<sup>78</sup> of the Legal Bureau of the ICAO maintains "that international air law conventions, including the law-making and regulatory decisions of the ICAO Council, are not binding upon a new State unless it has formally consented thereto, either through ratification or by an equivalent formal declaration". Dr. Mankiewicz draws a distinction between "public air law conventions", of which the Chicago Convention is one, and "private air law conventions" such as the Warsaw Convention, 1929, concerned with the unification of rules relating to international carriage by air. The latter (which will be dealt with subsequently in this section) he

---

<sup>78</sup> Mankiewicz, "Air Law Conventions and the New States", 29 Journal of Air Law and Commerce (1963) p. 54.



holds are automatically binding upon a new State, since they entail no international obligation but operate as part of the domestic law of the new State.<sup>79</sup> He contends that if a new State were automatically a party to the Chicago Convention it would be ipso facto a member of the ICAO, and be obliged to pay its share of the budget of the Organization as assessed by its Council. Furthermore, membership has the effect of imposing certain restrictions upon the rights of a sovereign State. For these reasons, no State should be considered bound without its express consent.

On the other hand, it is arguable that where treaty obligations are "locally connected" with the whole or portions of a territory, a new State whose sovereignty extends to the areas so affected succeeds to the obligations in question.<sup>80</sup> If therefore the air law conventions are regarded as belonging to the class of international treaties which create local obligations, the successor State, if it wishes to free itself from such obligations, would have to resort to a more formal procedure for terminating the conventions, including denunciation in accordance with the provisions of Article 95 of the Chicago Convention.

There is, however, a tendency on the part of the new States

---

<sup>79</sup> Ibid., p. 62; also in Annuaire Francais de Droit International (1957) pp. 405-412; "Les Nouveaux Etats et les conventions de droit aerien", Annuaire Francais (1961) p. 752.

<sup>80</sup> See, e.g., Oppenheim, International Law, Vol. I (8th ed., Lauterpacht, 1955) pp. 159, 165-166.





to acknowledge continuity of the conventions. After Pakistan separated from India in 1947, she notified the President of the ICAO Council on August 15, 1947, that "Pakistan has automatically accepted the Civil Aviation Convention, and the Air Transit Agreement, which were ratified by the former Government", in accordance with the provisions of the Indian Independence (International Arrangements) Order of 1947.<sup>81</sup> It stated also that "the successor Government of India (but not Pakistan) continues to enjoy membership of the Council, pending future elections". The ICAO, however, could not accept Pakistan's view since membership in the Organization is virtually synonymous with adherence to the Chicago Convention. Moreover, the ICAO was of the opinion that under the terms of the Indian Independence (International Arrangements) Order, 1947, membership in all international organizations devolves solely upon India. Pakistan, therefore, had to notify the United States Government, as depositary of the Chicago Convention, of its adherence thereto. But Pakistan's adherence did not become effective until the 6th of November, 1947, ninety days after the deposit of its instrument of adherence.

The formation of the U.A.R. on March 25, 1958, made it imperative to re-assess the membership status of Egypt and

---

<sup>81</sup> Section C of this Order stipulates that, except otherwise provided, "rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions", GAOR, 2nd sess., Sixth Cmtee., pp. 308-310; U.N. Doc. A/C.6/161, Annex 6C.



Syria in the ICAO. In a letter to the Secretary-General of the ICAO, the Minister of Foreign Affairs of the U.A.R.,<sup>82</sup> stated that the United Arab Republic should now be treated as a single member of the ICAO and considered bound by the provisions of the Chicago Agreement. Mr. Mohammed Sadek El Karmouty was appointed as the permanent Representative of the U.A.R. and "empowered to participate in all decisions on all matters to be submitted to the Organization". In addition, the letter affirmed

that all agreements, arrangements and obligations existing between the International Civil Aviation Organization on one hand and either Egypt or Syria on the other immediately before the constitution of the United Arab Republic will continue in their terms, Jus Mutatis Mutandis, as if they were agreements, arrangements and obligations duly concluded between the International Civil Aviation Organization and the United Arab Republic.<sup>83</sup>

This communication was followed on May 17, 1958, by a cablegram, confirming the appointment of Mr. Karmouty as the Permanent Representative of the U.A.R. with full powers to take part in the proceedings of the Organization.

Having regard to these communications, the decision which the ICAO Council had to take was (a) whether the U.A.R. was a Contracting State, or should be regarded as such; (b) whether the U.A.R. was a member of the Council; and (c) whether the cable of 17th May, 1958, could be accepted as the credentials of Mr. Karmouty as representative of the U.A.R. on the ICAO

---

<sup>82</sup> I.C.A.O. Working Paper A11 - WP/23, P/4.

<sup>83</sup> Ibid.



Council. The Council came to the conclusion that the United Arab Republic, having been established by the Union of two States which had been parties to the Chicago Convention, was to be considered, "for the matters within the competence of the Council", a contracting State and as a member of the Council. But it added that "this decision cannot prejudice the right of the Assembly to determine for itself questions concerning the United Arab Republic in relation to the Organization".<sup>84</sup> The Council's decision was transmitted to the Eleventh Session of the Assembly of the ICAO, held in Montreal. On the basis of it, the Assembly accepted the credentials of the U.A.R. delegate, and assessed the contribution of the U.A.R. to the budget of the ICAO.<sup>85</sup>

The outbreak of revolution in the Syrian sector of the Republic led to the dissolution of the Union on September 28, 1961. The ICAO was again confronted with the question of succession with respect to the membership of Syria in the Organization. At the end of September, the Government of Syria sent the following cable to the Secretary-General of the ICAO:

I have the honour to inform you that Syria has been a member of ICAO since 1949 and has been a member thereof jointly with Egypt under the designation: United Arab Republic (Stop) The union having been dissolved on 28 September last the Syrian Arab Republic reassumes its place in ICAO (Stop) I take this opportunity to assure you that the Syrian Arab Republic remains bound mutatis

---

<sup>84</sup> Declaration of March 29, 1958, ICAO Doc. 7878 C/905-18.

<sup>85</sup> Resolution A11-13, ICAO Doc. 7888 A11-P/12; Doc. 7886 A11-P/11-2-4.





mutandis by all conventions, arrangements and obligations which existed between ICAO and the United Arab Republic in conformity with the Convention on International Civil Aviation (Stop) Please confirm receipt of this cable and transmit copy of the cable to all States members of ICAO (stop)<sup>86</sup>

Copies of this cable were transmitted to all members of the ICAO Council by its President, who stated that, in the absence of any contrary views, Syria would in future be regarded as a contracting State. November 1, 1961 was set as the deadline for receiving any statements of objection from those member States who might wish to raise such objection. However, no statement of opposition was received by the President. The Council of the ICAO took cognizance of this communication at the Third Meeting of its Forty-fourth Session of that year, and approved the Report of its Finance Committee, re-adjusting the assessments of Egypt and Syria to the budget and the working capital fund of the Organization for the period between September 28 and December 31, 1961. The Council's decision was endorsed by the ICAO Assembly at its Fourteenth Session at Rome in August, 1962.<sup>87</sup>

The above cases of succession to the Chicago Conventions resulting from the dismemberment of a member State on the one hand, and the federation of a member State on the other, seem to indicate that the attitude taken by the ICAO in each instance

---

<sup>86</sup> ICAO Working Paper CWP/3434 and CWP/3449; ICAO Doc. 892C/934-14.

<sup>87</sup> ICAO Doc. 8192 C/934-3.



was broadly in conformity with the practice of the United Nations. It is interesting to note that many of the new States<sup>88</sup> have filed instruments of acceptance of the International Air Services Transit Agreement<sup>89</sup> in accordance with its Article VI (2) which provides that "any State a member of the International Civil Aviation Organization may accept the present Agreement". This implied that no State can become a party to this Agreement without also being a party to the Chicago Convention. The provision would, therefore, seem to apply directly to the new States. On the other hand, no new States appear to have accepted the International Air Transport Agreement, even though this was signed at Chicago on the same day and is governed by the same rules as apply to the acceptance of the International Air Services Transit Agreement.

Let us turn briefly to the practice of the new States with respect to the Warsaw Convention.<sup>90</sup> Although this is one of the private air law conventions concerned with the Unification of Certain Rules Relating to International Carriage by Air, it was extended by the contracting Parties to all non-metropolitan territories. The Convention was signed at Warsaw on October 12, 1929. Article 40 states that (a) any contracting

---

<sup>88</sup> These are Cameroon, Ceylon, Cyprus, Israel, Ivory Coast, Malagasy Republic, Malaysia, Morocco, Niger, Nigeria, Pakistan, Senegal and Tunisia.

<sup>89</sup> Concluded at Chicago on December 7, 1944.

<sup>90</sup> L.N.T.S., Vol. 137, p. 11; U.S.T.S., 876; Cmd. 4284.



State may at the time of deposit of ratification or accession declare that its acceptance of the Convention "does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any territory under its suzerainty"; (b) any State may subsequently adhere separately to the Convention in respect of any or all of such colonies and territories; and (c) it may denounce the Convention separately for all or any of them. In view of the possibility of subsequent changes in the international status of dependent territories, a modified version of these rules was incorporated in Article 23 of the Convention on International Recognition of Rights in Aircraft, concluded at Geneva on June 19, 1948;<sup>91</sup> in Article 25 of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) signed at the Hague on September 28, 1955;<sup>92</sup> and in Article 16 of the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, concluded at Guadalajara on September 18, 1961.<sup>93</sup> The last two agreements are intended to amend as well as to supplement the Warsaw Convention of 1929 in order to bring

---

<sup>91</sup> See 29 Journal of Air Law and Commerce (1963) p. 62 et. seq.

<sup>92</sup> Annuaire Francais (1957) p. 405.

<sup>93</sup> Loc. cit. note 88 above.





it into line with the final clauses of that Convention relating to dependent territories. It is to be noted that the expression "High Contracting Parties" is used in the Warsaw Convention; therefore, in so far as the colonies were concerned, it was in Head-of-State form, and was intended, for instance in the case of the British Empire, to apply to all of the colonies qua colonies. It will be recalled that in Philippson v. Imperial Airways Ltd.,<sup>94</sup> the British House of Lords held that the expression "High Contracting Parties" as used in the Warsaw Convention means "signatories". There is, however, room for doubt as to whether this was really a good decision. Nevertheless, from the point of view of State succession, this ruling raises the question whether the Warsaw Convention could be held to bind the new States who themselves were not "signatories". That is to say, are the new States signatories by succession, or is the expression to be regarded as applying only to the actual signatories? At least a representative of one of the new States has suggested, probably on the basis of this case, that the devolution agreements are legally deficient and that the new State signed them without experience.<sup>95</sup>

In the opinion of Dr. Mankiewicz, for the reasons stated above,<sup>96</sup> the Warsaw Convention, being a private air law con-

---

<sup>94</sup> Philippson v. Imperial Airways Ltd. (1939) A.C. 332.

<sup>95</sup> See Dr. T.O. Elias in U.N. Doc. A/CN.4/SER. A/1952, p. 4.

<sup>96</sup> See above p. 32, n. 75; p. 33, n. 76.



vention, applies automatically to the new States. However, there is no international arbitral authority in support of the view that the convention is automatically applicable in any of the new States.<sup>97</sup> Yet, the great majority of the new States have will-

---

<sup>97</sup> The continuity of the Warsaw Convention was tested in Dabrai v. Air India Ltd., in which the High Court of Bombay held that India was a "High Contracting Party" to the Warsaw Convention in so far as the Indian Independence Act, 1947, provided for a devolution of English law, and the Convention had been implemented by appropriate legislative action through the enactment of the Indian Carriage by Air Act, 1934, followed by the certification of the High Contracting Parties by the Governor-General in 1939 under the authority of the above Act (I.L.R., 1953, p. 41).

A similar question arose in the action brought by the French Treasury against Air Laos after the crash of a Laotian Airliner on June 16, 1953, on a flight from Vientianne, the capital of Laos, to Saigon. The French Tribunal civil de la Seine was to decide, in 1958, whether Laos and Vietnam, which were formerly French Protectorates, remained bound by the Warsaw Convention by virtue of its ratification by France. The Tribunal decided that "there can be no doubt that Laos and Vietnam were and remain bound by the undertakings given in their name by France prior to their independence" in as much as the convention has not been formally denounced by either State. The flight was held to be within the meaning of the expression "international carriage", and hence governed by the Warsaw Convention. See Tresor Public v. Cie Air Laos (1), Annuaire Francais de Droit International (1958) p. 725; Revue Francaise de Droit Aerien (1960) p. 214.

Article 1 of the Convention, amended by Article 1 of the Hague Protocol, 1955, defines "international carriage" to include any carriage in which, according to the contract made by the parties, the place of departure and the place of destination are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party. An agreed stopping place, even within the territory of a non-Contracting Party, is part of this definition.



ingly continued to apply the relevant air conventions. Congo (Brazzaville), Congo (Kinshasa), Ivory Coast, Niger, Mauritania, Laos, Malagasy Republic, Indonesia and Ceylon have all deposited declarations of succession; Israel, Pakistan, Philippines, Morocco, Mali and Guinea have chosen to adhere to the Convention. On the other hand, Dahomey has deposited instrument of ratification of the Hague Protocol, 1955, and this, in effect, is equivalent to adhering to the Convention. It is true that even though they have chosen to continue the policies of their parent States with respect to international air conventions, the new States are also desirous of becoming their own flag-carriers. This may, in certain cases, lead to the imposition of some limitations upon foreign carriers. To some of the East African States, the whole notion of State succession is viewed with great caution, if not apprehension. This has accounted for the reserved attitude taken by such States as Tanzania, Uganda, Malawi, and even Kenya and Zambia. To these States, problems affecting succession to the treaty obligations of their predecessor are a matter within the political discretion of each State. Consequently, they have decided to subject all the relevant treaties to a careful review before declaring publicly their attitude to them. After its independence on October 9, 1962, Uganda announced that it was not quite certain whether or not to adhere to the Chicago Conventions. Its motive appeared to be thoroughly political; for Uganda was not prepared to co-operate with airlines of certain states whose domestic policies







constituted a violation, in its view, of human rights. This would seem to suggest that, other things being equal, a new State might even be tempted to exploit its position vis-a-vis an existing treaty as a political weapon with which to pressure another State into modifying its domestic policy if such is found by the former to be distasteful.

7. Succession to Multilateral Instruments Administered by Other International Organizations

It is proposed to deal briefly in this section with the World Health Organization and the General Agreement on Tariffs and Trade (GATT) in order to show the general trend towards acceptance of the existing conventions by the new States.

The problem of succession to the international agreements administered by the WHO must be viewed in a special context since their practice is far less developed than that of the I.L.O., for instance. In other words, a new State is not made to declare itself bound by existing agreements of the WHO as a condition of admission to that Organization.

The WHO acts as the depositary of the International Sanitary Regulations of 1951. These were amended in 1955, 1956, 1960 and 1963. It further administers the Brussels Agreement, 1924, governing the granting of Facilities to Merchant Seamen for the Treatment of Venereal Disease. But Belgium acts as the depositary of this agreement. The Regulations No. 1 Regarding Nomenclature (including the Compilation and Publication of



Statistics) with Respect to Diseases, adopted in 1948 and added to in 1956, is also administered by the Organization.

Membership in the Organization is open to all States, and members of the United Nations may become members of WHO merely by depositing instruments of acceptance with the Secretary-General of the United Nations.<sup>98</sup> But States not members of the U.N. may apply directly to the Organization for membership, subject to the approval of the World Health Assembly. If admitted, such a State is then required to deposit a formal instrument of acceptance of the Constitution of the WHO with the Secretary-General of the United Nations.<sup>99</sup>

As regards the problem of succession, the Organization holds the view that the instruments of which it is the depositary remain binding on a new State after it achieves political autonomy. Nevertheless, the general practice is not to ask a new State to acknowledge continuity of such instruments on attaining independence.<sup>100</sup> On the other hand, the attitude of the Organization respecting those instruments of which it is not the depositary, but which it administers, remains undefined. Broadly speaking, the assumption is that such agreements continue to apply unless and until a new State expressly denies

---

<sup>98</sup> See statement by the Chief Legal Officer of WHO, I.L.A., Effect of Independence on Treaties (1965) p. 327.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid., p. 329.



their continuity.<sup>101</sup> Morocco, which had been a French Protectorate, was affected by the Brussels Agreement of 1924 by virtue of France's signature. But on independence, Morocco decided to deposit a fresh instrument of accession with the Belgian Government. No comment was made on the Moroccan action. Burma has not, on the other hand, become a party to the International Sanitary Regulations of 1951 (as amended in 1955, 1956, 1960 and 1963); in that case, the view of WHO remains that Burma continues to be bound by the Sanitary Convention of 1926 which was territorially applied to her. It would appear that Burma has acquiesced in this.

On the whole, the new States appear to have continued to apply all the agreements of which the Organization is the depositary. Information provided to the Organization by the new States regarding "quarantinable diseases" and action taken by them under the terms of Article 13 of the 1951 Regulations and Article 62 of the Constitution of the Convention, indicates that the overall attitude towards the enforcement of the prescribed regulations is favourable. It is conceivable that the obvious humanitarian character of these agreements may account for the markedly favourable disposition of the new States towards them.

The General Agreement on Tariffs and Trade is, strictly speaking, a multilateral treaty on international trade in which

---

<sup>101</sup> Ibid., p. 330.





a large number of countries participate. But it also forms the constituent instrument of that Organization. Its constitution clearly provides for succession on independence. Article XXVI: 5(c) states:

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

The colonial Powers had applied the GATT to all the non-metropolitan territories in accordance with the provisions of Article XXVI: 5(a) of the Constitution that "each Government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility". The procedure set out in paragraph c of this article was followed in admitting new States until 1963 when the procedure was considerably simplified. Under the new rule, a new State that wishes to become a member only has to notify the Executive Secretary of GATT, who then undertakes to certify that the conditions stipulated under Article XXVI: 5(c) of the Constitution have been met, and the new State is henceforth declared to be a contracting party.<sup>102</sup> While many of the new States<sup>103</sup> were admitted on independence as contracting parties,

---

<sup>102</sup> See GATT Doc. C/30 Restricted, April 26, 1963.

<sup>103</sup> Ghana, Gambia, Indonesia, Kenya, Malawi, Malaysia, Malta, Nigeria, Tanzania, Jamaica, Trinidad, Tobago, Uganda and Zambia.



some have shown reluctance in participating in the GATT.

In 1960, it was decided that parties to the GATT should continue to apply the provisions of the GATT, on a reciprocal basis, in their trade with the new States, for two years, or, if requested, three years, from the date of independence.<sup>104</sup> The majority of the new States were highly receptive to this offer, but some have shown a lukewarm enthusiasm towards it, even though in practice they are still applying the GATT. These States included Algeria, Congo (Kinshasa), Mali and Zambia. It should be noted that among the new States, Algeria is probably the only one that has attempted to remain faithful to its traditionally revolutionary principles. This attitude seems manifested in its outspoken dissatisfaction with certain elements of traditional international law. On this ground, it not only has decided against accepting the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute, but in all multilateral treaties to which she has become a party, she has often added a reservation, particularly with regard to any provisions dealing with the peaceful settlement of disputes in accordance with procedures specified in the treaties. Similarly, in connection with the law of State succession, Algeria is one of the minority of States who believe that a new State should start life completely unencumbered by the treaty obligations of its predecessor. This policy attitude

---

<sup>104</sup> I.L.A. Effect of Independence (1965) p. 238.



of the Algerian Government would seem to imply that Algeria wishes to remain the sole judge of whatever international obligations she wishes to accept.

The simplified procedure for admitting the new States to the GATT is designed to enable them to avoid the rather protracted process of negotiating for membership; furthermore, it is calculated to secure the maximum possible degree of continuity of the legal regime created by the GATT. But as is well-known, membership in any organization entails the acceptance of obligations and the enjoyment of certain rights by the members. Therefore, by accepting the status of contracting parties, the new States have in effect accepted the obligations formerly assumed on their behalf by their parent States. The rights and duties embodied in the GATT fall into four categories: (a) trade must remain non-discriminatory, and the contracting parties are urged to apply the most favoured nation principle; (b) protection of domestic industries is to be achieved only by customs tariffs rather than by other arbitrary methods; (c) a system of consultations shall be maintained between members; and (d) GATT shall furnish the framework within which negotiations can be undertaken with a view to the reduction of tariffs and other barriers to trade, and a structure for incorporating such negotiations into a legal instrument. There is little doubt that the ideals underlying these principles are in themselves attractive since they are designed to stabilize international commercial relations.





But it can be said, having regard to its very structure and purpose, that the GATT has been a hotbed of acute political and economic conflicts between the developed, industrialized nations and the underdeveloped, agricultural States, the preponderant majority of which are the new States. In participating in the GATT, each State's evaluation of its economic and political interests tends to overshadow the desire to develop or adopt rules of law which will comprehend the common interest of all the States. The new States tend to utilize their common element of poverty as the basic criterion of unity against the powerful, industrialized States.

In 1963, a number of the newly independent States adopted at their ministerial meeting a programme, calling upon the industrialized nations to reduce trade barriers and expand the access to industrial markets of exports from the developing countries. The new States appear to be sensitive to the dominating role of the industrialized States in the GATT; and the fact that they are producers of primary commodities, often at the mercy of fluctuating world prices, makes them implicitly distrustful of the GATT. They seem to believe that reduction of tariffs as envisaged by GATT stands to benefit the industrial nations, since their products do not have equal access to the markets of those countries. At the United Nations Conference on Trade and Development, held at Geneva in March to June, 1964, the new States' distrust of the GATT came to a head and resulted in proposals by some of these States, supported by the Soviet



Union, that a new trade organization should be established to replace the GATT. However, these proposals were rejected.

The foregoing would seem to illustrate the peculiar extent to which economic, political, and perhaps strategic considerations may influence a State's attitude and ultimate action even in the matter of succession to multilateral conventions.



## CHAPTER V

### SUCCESSION TO MEMBERSHIP IN INTERNATIONAL INSTITUTIONS

In the previous Chapter, a brief reference was made to the close relationship between membership in international organizations and inheritance of rights and duties arising out of treaties concluded under their auspices. But the two need not always go together. While it has been contended that a new State succeeds to the legal regime created by international organizations or to multilateral "law-making" treaties<sup>1</sup> concluded under their auspices, membership in such organizations cannot pass to a successor State;<sup>2</sup> it can be acquired only in accordance with the rules laid down in their constitutions.<sup>3</sup> This implies that unless the devolution of membership is expressly or implicitly provided for in the constituent instrument of the organization concerned, no succession to mem-

---

<sup>1</sup> Oppenheim, International Law, Vol. 1 (8th ed., Lauterpacht, 1955) p. 167; McNair, The Law of Treaties (1961) pp. 749-50; Jenks, "State Succession in Respect of Law-making Treaties", 29 B.Y.I.L. (1952) pp. 105-144.

<sup>2</sup> Vallat, "Some Aspects of the Law of State Succession", 41 Trans. Grotius Society (1956) p. 134; Jenks, loc. cit., p. 133; U.N. Doc. A/C.6/162, October 6, 1947; cf. Green, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity", 4 Canadian Yb. Int. Law (1966) pp. 32, 41-42.

<sup>3</sup> Mankiewicz, 29 Journal of Air Law and Commerce (1963) p. 53; Aufricht, 11 I.C.L.Q. (1962) p. 167.





bership can take place.<sup>4</sup> The GATT, for instance, provides, under Article 26(5) of its constitution, for succession on independence.

The following may be cited as illustrations of "law-making" treaties which may be inherited, or indeed have been inherited, by successor States: The Hague Conventions of 1899 and 1907 (both Pakistan and India, for instance, regard themselves as bound by these Conventions); the Convention for the Suppression of the Traffic in Women and Children of September 30, 1920; and the Peace Pact of Paris (1928). These and other such multilateral conventions, some of which were mentioned in the previous chapter, relate to matters of general humanitarian and technical interest to States. To a large extent, they appear essential to the orderly functioning of the international legal community since they deal with subjects of universal concern to nations and do not directly involve grave questions of political and economic survival of States, or of sovereign independence. For these reasons, their continued application is easily and willingly secured by the new State. It is, therefore, possible to maintain that such multilateral conventions are by and large the instrument-

---

<sup>4</sup> "Questions of membership are settled on construction of the membership and accession provisions of each constitutive instrument, which may or may not admit of an inheritance of membership, while succession to the legal regime established by the Organization is subject to the considerations applicable to "law-making" treaties." I.L.A. The Effect of Independence on Treaties (1965) p. 221; O'Connell, 38 B.Y.I.L. (1962) p. 135.



ality by which an objective legal regime is created. The legal regime so created is therefore binding upon a new State irrespective of its will.

The constitutive instrument of an international organization cannot be assimilated to a multilateral convention creating an objective legal regime and intended to be permanent, even though it may be subject in some cases to a stipulated right of denunciation. On the other hand, it forms the basis of a particular international law while acting simultaneously as the constitutional document of the organization concerned. In the latter sense, the constitutive instrument defines the structure and functions of the Organization, the conditions and procedures governing membership, the obligations incumbent upon members and the rights to which they are entitled. As a rule, obligations attaching to membership in an organization are often of such a nature that they cannot bind a State without its express consent. In general, the effect of membership amounts to a restriction in some degree of a State's sovereign rights.<sup>5</sup> Thus, a new State which exercises sovereignty over a territory formerly under the authority of its predecessor will be considered a member of a given organization to which its predecessor was party only after it has fulfilled the conditions of membership as stipulated by its constitution. In this connection, it has

---

<sup>5</sup> Green, loc. cit., n. 2 above, p. 32.



been aptly observed that

There is no essential difference between administrative multilateral conventions and conventions constituting international organizations. A State adhering to the latter type of convention undertakes a multiplicity of obligations, all of which are strictly personal in character. This being so, it is to be expected that the contractual relationship of the member to the organization is dependent on the former's continued personality. When this personality is drastically affected by internal or external changes the rights and obligations of membership are discharged under the general principle of treaty law. If it were otherwise a new State which is formed out of the territory of a member State of the United Nations could claim the latter's rights of membership even though its constitution and activities might be inimical to the purposes of the United Nations Charter. Membership of any international organization has as its essence a willingness to co-operate in the furtherance of schemes of international solidarity. Such a willingness cannot be assumed on the part of a new State whose territory falls within the ambit of these schemes.<sup>6</sup>

The emphasis here is upon the continued existence of the personality of the State as a juridical fact. For a State's membership in an international institution subsists if its international personality remains unextinguished, regardless of whether there have been constitutional or frontier changes affecting its territory. On the other hand, if the legal personality of a State, and hence its international identity, is completely destroyed as a result of the total absorption of its territory by another State, or of its break up into a number of new States, its status as a member of an international organization becomes affected in so far as such membership imposes obligations and confers rights upon States members.

---

<sup>6</sup> O'Connell, The Law of State Succession (1956) p. 65.







The cases of Ethiopia,<sup>7</sup> Austria,<sup>8</sup> Czechoslovakia<sup>9</sup> and Albania<sup>10</sup> under the League of Nations system provide an excellent example of the disappearance of members of an international organization following the extinction of their legal personality. In 1936, Ethiopia was forcibly annexed by Italy. Both had been members of the League. The announcement by Italy of the dissolution of the Ethiopian State in May, 1936, and the recognition by other members of the Organization of the King of Italy as the de jure sovereign of Ethiopia led to a situation wherein Ethiopia was in fact no longer treated as a member of the Organization even though its name remained on the official list of League members.<sup>11</sup>

Austria, a member of the League of Nations, was annexed in 1938 by Germany who, in a note to the Secretary-General of the Organization, merely announced that Austria had ceased to exist as a State and was no longer a member of the League. At the League Council meeting in May, 1938, the question of the absorption of Austria by Germany was perfunctorily discussed and the de facto situation recognized as a fait accompli. A

---

<sup>7</sup> League of Nations, Official Journal, Sp. Suppl., 151, p. 82; L.N.O.J. (1936) p. 535.

<sup>8</sup> L.N.O.J. (1938) p. 237.

<sup>9</sup> L.N.O.J. (1939) p. 248

<sup>10</sup> Ibid., p. 246.

<sup>11</sup> League Docs., Members of the League and Composition of the Council, 21st September, 1938, p. 2.



resolution of the Council merely granted the status of refugees to those who had fled from Austria and the High Commissioner for Refugees was authorized to take charge of all such cases. By September of 1938, Austria had been completely dropped from the list of members of the League.

In 1939, both Czechoslovakia and Albania also lost their independence through forcible occupation of the Nazi powers. In March of that year Germany had announced the annexation of Bohemia and Moravia. Some of the great Powers, including Great Britain and France, had granted de facto recognition to the German protectorate over Bohemia and Moravia, but the onset of the Second World War soon after Germany's proclamation of the annexation of these territories restrained other governments from granting de jure recognition to this claim. By 1945, however, Czechoslovakia's membership of the League was reactivated, but during the interregnum between 1939 and 1945, Czechoslovakia, though still on the list of League members, had virtually ceased to function as a member of the Organization. Similarly, Albania, in April of that year, had been subjected to a military attack by Italy who proceeded to set up a puppet government, which on the 13th of April, 1939, announced Albania's withdrawal from the League of Nations.<sup>12</sup> Prior to this, however, the legitimate Government of Albania led by King Zog had appealed to the League to help restore the independence of Albania and to ask its members not to recognize

---

<sup>12</sup> L.N.O.J. (1939) p. 246.



the annexation by Italy. But the inaction of the League regarding the Albanian complaint supported by the lukewarm attitude of Mr. Avenol, the Secretary-General, resulted in the League's acquiescence in the disappearance of Albania as an active member of the Organization. These are historical examples of the effect upon membership in international organization of the disappearance of the legal personality of a State; but it will be noticed that the dissolution of these States - the extinction of their international identity - was brought on not by peaceful, voluntary means, but by the aggressive acts of other States. The central issue, however, is that, irrespective of the process by which the destruction of their legal personality was brought about, the legal effect of the disappearance, consequent upon international recognition, was their discontinuation as effective members of the League of Nations.

The experience of the United Nations in this respect is slightly different. For purposes of succession to membership, certain member States of the Organization have undergone territorial changes either as a result of the secession of a part of the original State, which then constituted itself into a new State; of the voluntary union of a number of existing States into a larger territorial unit; or of the voluntary dissolution, or dismemberment of such union into two or more new States.

The United Nations was first confronted with the problem of succession to membership when in 1947, India, an original







member of the Organization, was divided into two States. The theoretical problems engendered by this division were analysed in an earlier chapter,<sup>13</sup> but in view of the special context of this discussion - the effect of State succession upon membership in international institutions - an attempt will be made here to summarize the Indian instance in order to throw some light on the approach of the United Nations to this specific problem. This will be followed by a comparative analysis of the practice of other selected international organizations in regard to similar developments.

On 15th of August, 1947, Pakistan, formerly a part of British India, became a new State by the operation of the Indian Independence Act, 1947,<sup>14</sup> an enactment of the United Kingdom Parliament. On that date, Pakistan sent a cablegram to the Secretary-General of the U.N., stating that both India and Pakistan should be considered as members of the United Nations "automatically with effect from 15th of August".<sup>15</sup> It further intimated that in the event that the Secretariat was not willing to accept this view, the cable should be regarded as Pakistan's formal application for admission to the Organization. The Secretary-General chose the second alternative and referred Pakistan's application to the Security Council

---

<sup>13</sup> Supra, Ch. 2.

<sup>14</sup> 10 & 11 Geo. VI, C. 30.

<sup>15</sup> SCOR, 2nd Yr. No. 78, 186th Mtg., pp. 2027-2028.



for recommendation in accordance with Article 4 of the U.N. Charter.

The Secretary-General's action seems to have been based upon the legal opinion of the Secretariat, issued on August 8, 1947,<sup>16</sup> regarding the legal implications of the partition of India inasmuch as this affected the membership of and representation in the U.N.

The legal opinion started by analysing the Indian Independence Act, 1947. It then drew the following conclusions from it: (1) "From the point of view of international law, the situation is one in which a part of an existing State breaks off and becomes a new State." This has no effect upon the international status of India, who continues as a State with all the treaty rights and obligations, and hence with all rights and obligations of membership in the United Nations. "The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and will not, of course, have membership in the United Nations"; (2) the Independence Act has merely instituted a constitutional change in India, endowing it with a Dominion status and with plenary competence in foreign affairs. Such a change, therefore, has no effect upon India's international personality or upon its status in the United Nations. The opinion then indicated that it would

---

<sup>16</sup> U.N. Press Release PM/473, 12th August, 1947; U.N. Doc. A/CN.4/149, I.L.C. Yearbook, Vol. II (1962).



be appropriate if the Secretary-General requested the Indian representatives to present new credentials "in view of the change of sovereignty".

At this point, reference must be made to the agreement concluded between representatives of India and Pakistan as to the devolution of international rights and obligations. The agreement was reached on August 6 and promulgated on August 14, 1947, but it was not communicated to the United Nations until August 27, 1947.<sup>17</sup> This was embodied in a Schedule to the Indian Independence (International Arrangements) Order, 1947, promulgated by the Governor-General of India, and paragraph 2(a) of which stated:

Membership of all international organizations together with rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.<sup>18</sup>

Despite the conclusion of this devolution agreement, Pakistan proceeded to claim the status of a co-successor to the membership of the United Nations.<sup>19</sup> Even after she had been admitted as a new member, she persisted in the belief that she was not a new State but a co-successor of British India, and hence an original member of the Organization.<sup>20</sup> It is not, however,

---

<sup>17</sup> GAOR, 2nd Sess., 6th Cmttee., pp. 308-310, annex 6c; U.N. Doc. A/C.6/161.

<sup>18</sup> Ibid.

<sup>19</sup> SCOR, 2nd Yr. No. 78, pp. 2027-2028; S/498; see also Gen. Ass. Res. 108 (II).

<sup>20</sup> GAOR, 2nd Sess., 92nd Mtg., p. 317.





clear to what extent the above agreement could be said to have influenced the legal opinion of the Secretariat, seeing that its decision regarding India's membership status in the U.N. broadly coincided with the terms of this provision of the Agreement. The fact, however, that the opinion was given before the Agreement was officially communicated to the Secretary-General appears to suggest that it was probably based on other criteria. One authority has stated that the opinion "tends to reflect a preconceived position and does not adequately pursue the arguments made to the opposite effect".<sup>21</sup> In any event, the devolution agreement is binding only as between India and Pakistan; it could have no effect on third parties unless they were willing to accept it as imposing legal obligations on them.<sup>22</sup>

The decision to admit Pakistan alone as a new member did not go unchallenged either in the Security Council<sup>23</sup> or in the General Assembly.<sup>24</sup> As a result, the Sixth Committee of the General Assembly was requested to draw up rules which might be applied to future cases. The final statement of the Sixth Committee tended to confirm the legal opinion of the Secretariat which appeared to have guided the initial decision of the

---

<sup>21</sup> Green, "The Dissolution of States and Membership of the United Nations", 32 Saskatchewan Law Review (1967) p. 103.

<sup>22</sup> Ibid., p. 104; E. Lauterpacht, 7 I.C.L.Q. (1958) pp 505-529.

<sup>23</sup> See SCOR, 2nd Yr., No. 78, 186th Mtg.

<sup>24</sup> U.N. Doc. A/C.1/SR.59; A/C.6/156.



Secretary-General. It held that as a general principle a member State does not cease to be a member simply because its constitution or its frontier has been subjected to changes, and that before its rights and obligations can be considered to have ceased to exist, it must first be shown that its legal personality has been extinguished. Furthermore, where a new State is created, even if it constitutes part of the territory of a member, such a new State could not claim to have succeeded to the right of membership, and a new application for admission must be made.<sup>25</sup>

Egypt and Syria, having taken part in the San Francisco Conference, have been original members of the United Nations. On February 21, 1958, a plebiscite was held in both territories to decide whether the two States should constitute themselves into a single State. In a note, dated February 24, 1958,<sup>26</sup> the Foreign Minister of the United Arab Republic informed the Secretary-General of the United Nations of the formation of the United Arab Republic, by the union of Egypt and Syria, with Cairo as its capital. In a further communication of March 1, 1958, the Foreign Minister of the U.A.R. expressed his compliments to the Secretary-General, requesting him to transmit to all members of the Organization and its principal as well as subsidiary organs, "particularly those

---

<sup>25</sup> A/C1/212; GAOR, 2nd Sess., First Cmttee., pp. 582-583, annex 14g.

<sup>26</sup> S/3976, annex 1.



on which Egypt or Syria, or both, are represented", the information contained in his note of February 24, 1958. The note added:

It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.<sup>27</sup>

Accordingly, the Secretary-General transmitted the two notes on March 7, 1958 to all members of the United Nations and to principal and subsidiary organs of the Organization,<sup>28</sup> informing them of his receipt of the credentials of the Permanent Representatives of the U.A.R. But in doing so, he stressed that his acceptance of the credentials was "an action within the limits of his authority, undertaken without prejudice to and pending such action as other Organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic..."<sup>29</sup>

The President of the Trusteeship Council, which was then in session, read the Secretary-General's note to members of the Council at the end of a meeting on the morning of the 7th of March, stating that the necessary administrative arrange-

---

<sup>27</sup> S/3976, Annex II, SCOR, 13th Yr., Suppl. for Jan - March, 1958, p. 32.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.





ments would be made by the Secretariat for the next meeting of the Council. At the beginning of its 880th meeting, the U.A.R. Representative took his seat. While a number of representatives accepted the administrative adjustments, others expressed reservation of their position, but there was no clear opposition to the seating of the U.A.R. Representative. Thus, the French delegate stated that he was obliged to reserve his Government's position in the matter until relations between France and the new State and its component countries returned to normal. This was in apparent reference to the diplomatic relations broken off during and since the Suez conflict of 1956. He added that at a later meeting he would express his delegation's views with regard to the procedure followed by the Secretariat, which should not constitute a precedent. It will be recalled that similar views had been expressed by the Polish member of the Security Council in 1947, during the discussion of Pakistan's application for membership. After the Council voted in favour on "the question of admitting Pakistan to membership in the United Nations", the Polish delegate remarked that the vote could not be used as a precedent to omit consideration by the Committee on the Admission of New Members.<sup>30</sup> The Chinese representative emphasized that the change that had been made with respect to the U.A.R. should not prejudice any future decisions to be taken by other organs

---

<sup>30</sup> SCOR, 2nd Yr., No. 78, pp. 2052-2055.



of the U.N. The Australian delegate indicated that he would transmit the Secretary-General's communication to his Government. His delegation, he said, expected that the membership of the United Arab Republic in the United Nations would be recognized in due course by the appropriate authorities, but in the meantime he thought it would be an appropriate working arrangement for the representative of the U.A.R. to take his seat in the Trusteeship Council, so that the Council might continue its work.<sup>31</sup>

Similar procedure was followed both by the International Law Commission<sup>32</sup> and the United Nations Conference on the Law of the Sea,<sup>33</sup> except that in the I.L.C., the Syrian member had to resign while the Egyptian member retained his seat, since under the Commission's Statute no two members should possess the same nationality. At the Conference on the Law of the Sea, however, the Secretary-General's note verbale, together with the two notes from the U.A.R., was circulated as a Conference document.<sup>34</sup> Again, no formal resolution was moved, nor was the matter even placed on the agenda of the Conference.

---

<sup>31</sup> Trusteeship Council, Official Records, 21st Session, March 7, 1958, 879th Mtg., p. 2221, 880th Mtg., p. 223.

<sup>32</sup> See Report of the Int. L. Commission, 10th Sess., GAOR, 13th Sess., Suppl., No. 9 (A/3859) p. 1.

<sup>33</sup> U.N. Doc. A/CONF. 13/38, March 18, 1958, p. 7.

<sup>34</sup> U.N. Doc. A/CONF. 13/L4.



No objection having been raised, the U.A.R. delegate was seated at the Conference. At this juncture, mention should be made of the attitude of the United States Government. The United States, a great Power, and perhaps by far the most influential member of the United Nations, emerged at the U.N. Conference on the Law of the Sea as a staunch supporter of the U.A.R.'s bid for membership.

The U.S. delegation was instructed by the State Department to support acceptance of the credentials of the delegation from the U.A.R., and to regard the delegation as having only one vote. The U.S. delegation was further instructed to state the American position regarding the question whether the U.A.R. was a member of the United Nations. The note read as follows:

The United States delegation should take the position that it (the U.A.R.) is a Member. The U.A.R. is the product of a merger between Syria and Egypt, both of which were Charter Members of the United Nations. The U.A.R. is their successor and as such succeeds automatically to the membership of the United Nations and the specialized agencies of which either Egypt or Syria was a member in exercising its rights of membership, however, it can only have one vote.

In transmitting a similar statement of policy to the United States Mission to the United Nations, the State Department stated:

Applying this position to the current session of the Trusteeship Council, of which Syria but not Egypt is a member, the Department would expect the U.A.R. to replace Syria whenever the union becomes effective through a simple change in nomenclature and leaving to the U.A.R. whether the present Syrian representative





continues as representative of the U.A.R. or a new representative is designated.<sup>35</sup>

On March 7, 1958, Mr. Mason Sears, the United States representative on the Trusteeship Council, made the following statement before the Council:

As a result of a plebiscite on February 21, 1958, Egypt and Syria have voluntarily united into the United Arab Republic. The United Arab Republic is, therefore, in our opinion their successor in the organs of the United Nations where formerly either Egypt or Syria participated.

On this occasion, I wish to extend the good wishes of the United States of America to the United Arab Republic and to welcome its representatives to this council.<sup>36</sup>

Two things ought to be noted about the U.S. position on this question: (1) It acknowledges that the U.A.R. is a successor State to Egypt and Syria; (2) It asserts the rather controversial principle of automatic succession to membership in the U.N. It is, however, difficult to determine to what extent the American example may have influenced the other members of the U.N. and its specialized organs.

The salient feature of this development consists in the administrative decision concerning the membership status of the new State, for in each case, the representative of the U.A.R. was merely substituted for those of Egypt and Syria. By limiting such a crucial decision as the admission of a new

---

<sup>35</sup> The Secretary of State to the United States Mission to the United Nations, CA-7037, February 14, 1958,; Whiteman, 2 Digest of International Law (1963) p. 1024.

<sup>36</sup> U.S. - U.N. Press Release 2881; State Department Bulletin, Vol. 38, No. 979 (1958) p. 537.



member to the administrative level, the pertinent rules of procedure relating to the admission of a new State to the Organization were by-passed. Article 4(2) of the Charter provides that "the admission of any... State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". It is not clear why the admission of the U.A.R., a new State with a new international personality, was exempted from the application of the principles formulated by the Sixth Committee of the General Assembly at the time of the case of Pakistan, since those were intended to provide a guide to future action with respect to the succession of States.

The emergence of the U.A.R., with a new international identity, could be regarded as either (1) a case of extinction of two pre-existing States and the establishment of a new one, or (2) a case involving the absorption of one State by another - in this case, of Syria by Egypt - which then changed its name into the U.A.R. The latter view would appear to be supported by the United Nations attitude to the problem, for the U.A.R. was not treated as a new State; consequently, it was not required to apply for admission to the United Nations.<sup>37</sup> On the other hand, when the relevant constitutive documents of the union are considered, evidence seems to support the

---

<sup>37</sup> Cotran, "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 I.C.L.Q. (1959) pp. 358-364.



former interpretation,<sup>38</sup> in which case, the creation of the U.A.R. upon the disappearance of Egypt and Syria represented a definite case of State succession, and should have been dealt with in accordance with the accepted procedures of the United Nations. But it would appear that the administrative solution provided by the Secretariat derived less from legal principle than from political expediency, in view of the continued political tension between France, Britain and Israel on the one hand, and Egypt on the other, following the Suez crisis of 1956.

On September 28, 1961, a revolution broke out in the Syrian region of the Republic, and established control over the whole territory of that region. On September 30, 1961, the new President of the Council of Ministers and Minister of Foreign Affairs of the Syrian Arab Republic informed the President of the General Assembly of the U.N. that he had assumed office at noon on the previous day.<sup>39</sup> Meanwhile, the President of the U.A.R. announced on the radio that his Government would not oppose the readmission of Syria to the U.N. On October 8, the President and Foreign Minister of the Syrian Arab Republic sent another cable to the President of the General Assembly referring to his previous cable and assuring him of his Government's firm adherence to the

---

<sup>38</sup> Green in 32 Saskatchewan Law Review (1967) p. 108.

<sup>39</sup> U.N. Doc. A/4913 - S/4957.





principles of the Charter and its "desire to exercise its international relations on the basis of justice and peace". The cable reminded the President that "the Syrian Republic was an original Member of the United Nations under Article 3 of the Charter and continued its membership in the form of a joint association with Egypt under the name of the United Arab Republic". It added that Syria had now resumed her former status as an independent State, and requested that the "United Nations take note of the resumed membership in the United Nations of the Syrian Arab Republic".<sup>40</sup>

The cables from Syria were published on October 9, 1961, as documents of the General Assembly and the Security Council. At the 1035th plenary meeting of the General Assembly, held on the morning of October 13, 1961, the President drew the attention of the members to the cables from the President and Foreign Minister of Syria, and stated that on the basis of his consultations, "the consensus seems to be that, in view of the special circumstances of this matter, Syria, an original Member of the United Nations, may be authorized to be represented in the General Assembly as it has specifically requested". He hoped there was no objection to such on the part of any delegation and stated that if no objection was raised before the beginning of that afternoon's plenary meeting, he would "request the Secretariat to take the necessary measures so that the delegation of the Syrian Arab Republic may take its seat in

---

<sup>40</sup> U.N. Doc. A/4914 - S/4957 (Emphasis supplied).



the General Assembly as a Member of the United Nations".<sup>41</sup>

At the 1036th plenary meeting of the General Assembly on the same day, the President of the Assembly announced that following the declaration he had made that morning, he had received "no objection on the part of any delegation or of any member State of our Organization. Accordingly, the necessary measures have been taken, and the delegation of the Syrian Arab Republic has taken its seat in the Assembly as a Member of our Organization, with all the obligations and rights that go with that status". Thereafter, Syria became a member of all organs on which all members of the U.N. are represented. The U.A.R. retained its membership in such organs as well. Syria resumed its role in the Advisory Commission of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, in which she had participated before the establishment of the United Arab Republic in 1958.<sup>42</sup>

The secession of Syria from the U.A.R. was in many respects similar to that of Pakistan from India. When Pakistan was created, the consensus of legal opinion was that as a successor State, it could not inherit the membership of the United Nations; accordingly, Pakistan was advised to apply for membership in the Organization. But on Syria's reappearance, the U.N. broke with that precedent. Syria simply asked the U.N.

---

<sup>41</sup> U.N. Doc. A/CN.4/149, p. 11.

<sup>42</sup> Ibid.



to take note of its resumption of membership, thus implying that its lapsed status was merely in a state of abeyance, and that it was now re-asserting it. Most members of the Organization appear to have tacitly accepted the situation, thereby creating the impression that the membership of Syria was indeed presumed to have continued even during the period of its political union with Egypt.<sup>43</sup> What seems to have been forgotten is the fact that the name of the State which now reasserted its membership was no longer the old Syria but the Syrian Arab Republic.<sup>44</sup> It has been suggested, however, that the United Nations approach to the problem has the merit of being simple and pragmatic;<sup>45</sup> but it is equally arguable that the subordination of law and the requirements of the Charter to mere political and practical convenience also has the disadvantage of uncertainty and inconsistency. Furthermore, the practice is susceptible both to errors of bureaucratic judgment and the abuse of individual States. This departure from established principle may well have accounted for Indonesia's cavalier withdrawal from membership of the United Nations only to resume it a few years later with little discussion, if not actual connivance, on the part of the members of the United Nations.

---

<sup>43</sup> Young, "The State of Syria: Old or New?", 56 A.J.I.L. (1962) p. 482.

<sup>44</sup> Green, loc. cit., p. 109.

<sup>45</sup> O'Connell, State Succession, Vol. 2 (1967) p. 198.





The fourth case with which the United Nations had to deal was that relating to the dissolution of the nascent Federation of Mali. This was not a case of succession to an already existing member; it was in fact a question of the United Nations recognition of the dissolution of the union.

The Federation of Mali, formed by the union of Senegal and Sudan, achieved political autonomy on June 20, 1960, and by a telegram dated June 23, the Government of the Federation notified the Secretary-General of the U.N. of Mali's application for membership in the Organization.<sup>46</sup> The Security Council, in its resolution of June 28, 1960 recommended to the General Assembly that the Federation be admitted to membership.<sup>47</sup> However, on August 20, 1960, the Government of Senegal sent a cable to the Secretary-General, informing him that the Legislative Assembly of Senegal had adopted an Act declaring the withdrawal of Senegal from the Federation and proclaiming the independence of the Republic.<sup>48</sup> Senegal thus requested that it be admitted to the U.N. The request was renewed in subsequent communications of August 23, and September 22, 1960.<sup>49</sup> Although a number of new States had been admitted on September 20, 1960, the General

---

<sup>46</sup> U.N. Doc. S/4347.

<sup>47</sup> U.N. Doc. S/4357.

<sup>48</sup> U.N. Doc. S/4470, annex 1.

<sup>49</sup> U.N. Doc. S/4470, annex III; S/4530 and Corr. 1.



Assembly was not able to consider the Security Council's recommendation concerning the Federation of Mali.<sup>50</sup>

By a letter and a telegram, both dated September 22, 1960, the Sudanese Republic, which had formed a part of the Federation of Mali, also informed the Secretary-General that she had adopted the name Republic of Mali and was now fully sovereign. It therefore requested admission to the United Nations.<sup>51</sup>

On September 28, 1960, the Security Council considered the separate applications of the two new States. During the discussion, the view was expressed that the division of the Federation into two new States had in fact nullified the Council's resolution of June 28, 1960. The Security Council, therefore, adopted two new resolutions,<sup>52</sup> recommending the admission of Senegal and Mali respectively. In the General Assembly, two resolutions<sup>53</sup> were also adopted, admitting Senegal and Mali to membership in the United Nations. No serious problem seemed to have arisen in this particular instance. The two States, after the dissolution of the Union applied for admission to the U.N., and their respective applications were handled under the relevant rules of proce-

---

<sup>50</sup> GAOR, 864th Plenary Meeting, paras 55-56.

<sup>51</sup> U.N. Docs. S/4534 and S/4535.

<sup>52</sup> U.N. Docs. S/4543 and S/4544.

<sup>53</sup> G.A. Res. 1490(XV) and 1491(XV), September 28, 1960.



ture. The adoption of new resolutions both by the Security Council, recommending the admission of the new States, and by the General Assembly, admitting them as separate States, amounted to a recognition of the state of fact created by the dissolution of the Federation.

The unification of Zanzibar with Tanganyika in 1964, possesses, in a certain sense, features akin to the union of Malaya and the British Crown Colony of Singapore into the Federation of Malaysia. Zanzibar gained her independence in December, 1963, and was thereafter admitted to membership in the United Nations.<sup>54</sup> In April, 1964, the Government of the Republic of Tanganyika and that of the People's Republic of Zanzibar signed the Articles of Union, establishing the United Republic of Tanzania.<sup>55</sup> Meanwhile, pending the adoption of a new Constitution, the two regions - Tanganyika and Zanzibar - were to be governed under the existing Constitution of Tanganyika, subject to certain modifications. When in 1963 Singapore joined Malaya to form the Federation of Malaysia, the Constitution of the Federation of Malaya was the one to be adapted to cater for the new situation.<sup>56</sup> Similarly, on the accession of Zanzibar to Tanganyika, the Constitution of Tanganyika had

---

<sup>54</sup> G.A. Res. 1975(XVIII), December 16, 1963.

<sup>55</sup> See 3 International Legal Materials (1964) p. 763.

<sup>56</sup> Constitution Amendment Act, 1963, Fed. Gov't. Gazette, August 13, 1963, Vol. VIII, No. 16.





to be amended to provide for the new Union. The formation of the Union Republic appeared, to all intents and purposes, to be a case of the absorption of one State by another. The President of Tanganyika was now proclaimed the President of the United Republic; Tanganyika's representative at the United Nations became the representative of Tanzania while the original representative of Zanzibar was withdrawn. The President of the United Republic was empowered to extend Tanganyika law by decrees, pending the adoption of a constitutive instrument, to the entire Republic - Zanzibar included. Tanzania undertook to inform all the international organizations in which both Tanganyika and Zanzibar had previously participated as separate members that the two countries had now constituted themselves into a single sovereign Republic and that adjustments should be made regarding their membership status accordingly.<sup>57</sup> The United Nations thereupon took cognizance of the constitutional changes in Tanganyika. The United Republic of Tanzania was therefore designated as a single member of the Organization and its specialized agencies in place of both Tanganyika and Zanzibar. It would appear that little or no discussion took place in the U.N. on the change of sovereignty in Tanganyika and its effect on membership in the Organization.

It is interesting to note that on Singapore's secession

---

<sup>57</sup> See, e.g., GATT Doc. L/2268, October 7, 1964.



from Malaysia in August, 1965,<sup>58</sup> Malaysia resorted to the rather novel technique of attempting to confer upon the former, by its own legislative instrument, membership in international organizations. Article 13 of the Malaysia Act explicitly provided that "any decision taken by an international organization and accepted before Singapore Day by the Government of Malaysia shall in so far as that decision has application to Singapore be deemed to be a decision of an international organization of which Singapore is a member". Commenting on this provision of the Malaysia Act, Professor Green noted that it is in order to the extent that "it relates to decisions of organizations of which Singapore is a member, but in its terms it is wide enough to impose obligations upon Singapore arising from decisions of organizations of which it is not a member and of which it does not wish to become a member".<sup>59</sup>

Clearly, the United Nations approach to these cases of succession to membership appears somewhat anomalous, and little guided by any consistent set of legal principles. In its handling of individual cases, a premium seems to be put on the surrounding political elements, and this leads to the judging of each case almost entirely "on its merits".

---

<sup>58</sup> Independence of Singapore Agreement, Singapore Gov't Gazette, Vol. 7, No. 66, August 9, 1965.

<sup>59</sup> Green, loc. cit., note 2 above, p. 42.



1. Organizations that Provide for Succession to Membership

Besides the General Agreement on Tariffs and Trade, which we have discussed earlier,<sup>60</sup> one other organization whose constitution provides for succession upon independence is the International Tin Council. The Organization was first established in 1956. Its constitution was revised in 1961. Under the First International Tin Agreement of 1956, contracting Governments were required to declare the separate participation of dependent territories; but no specific provision was made for succession to membership of the dependent territories on becoming independent.

However, with the modification of its constitution in 1961 - the Second International Tin Agreement - a new Article<sup>61</sup> was inserted which provided for automatic succession to membership, unless, of course, the new State made a declaration to the contrary.<sup>62</sup> Paragraph b of Article 22 provides:

A country or territory, the separate participation of which has been declared under Article III or paragraph 2 of this Article by any contracting Government, shall, when it becomes an independent State, be deemed to be a Contracting Government and the provisions of this Agreement shall apply to the Government of such State as if it were an original Contracting Government already participating in this Agreement.

Only Malaya, Nigeria and Belgian Congo/Ruanda-Urundi were

---

<sup>60</sup> Supra, Ch. IV.

<sup>61</sup> Article XXII of the Agreement.

<sup>62</sup> I.L.A., The Effect of Independence on Treaties (1965) p. 239.





members of the Council while still dependent territories.<sup>63</sup> The United Kingdom had ratified the Agreement on behalf of both Malaya and Nigeria at the request of the local legislative assemblies of those territories. On accession to independence, the two countries sent formal letters to the Council, informing it of their independence. They were from then regarded as entering into the obligations previously accepted on their behalf by the United Kingdom Government.

Congo (Kinshasa) signed and ratified only the Second Agreement of 1961. On the other hand, Belgium signed on behalf of Ruanda-Urundi, which, however, was shortly to become independent as Rwanda and Burundi. But the succession provisions of the above Article seem to apply only to ratification or accession as stipulated under Article 3, and not to signature. On ratifying the Second Agreement, Belgium informed the Industrial Tin Council that Ruanda-Urundi did not propose to ratify the Agreement. Thus, on achieving independence, Rwanda and Burundi were not considered Contracting Governments and, therefore, not members of the Second Agreement.

It should, however, be noted that in the draft Third Agreement, the succession clause of Article 22(b) of the Second Tin Agreement has been dropped on the ground that the newly independent States have expressed views antagonistic to

---

<sup>63</sup> Ibid.



succession theory, to the effect that its aim is to encumber them with the actions and obligations of their colonial masters.<sup>64</sup> But it need be added that only a negligible minority of the newly independent States are in fact tin-producing.

## 2. Practice of Other Organizations Regarding Succession of New States

The African Postal Union, although regional in character, is worth mentioning in this connection because of its peculiar approach to the problem of succession. Its Constitution does not expressly provide for succession upon independence, yet "inheritance" of membership has been admitted by the Organization itself. The Union was founded in 1935; its Constitution was revised in 1948. Under Article 3(1), "the administration of a country in the African Zone on whose behalf this Agreement has been signed, may accede thereto at any time". Paragraph 2 of the same Article states that accession is to be effected by notification to the Bureau of the Union, which in turn shall undertake to notify other members of the Union; and paragraph 3 declares that "accession shall carry with it, of full right, all the obligations and all the advantages provided by this Agreement: in addition it shall involve the obligations and advantages provided by

---

<sup>64</sup> See O'Connell, State Succession, Vol. 2 (1967) p. 220.



the particular Working Arrangements which the acceding administrations undertake to apply".

By 1963, the Kingdom of Burundi, Malagasy Republic, Republic of Cameroun, Republic of the Congo (Kinshasa), Republic of Rwanda, Republic of Congo (Brazzaville), Central African Republic, Republic of Chad, and Republic of Gabon were all listed by the Bureau of the Union as having "Inherited a signatory's membership". Other new States, including Kenya, Uganda and Tanganyika (now Tanzania) appear to have acceded to membership.

The International Union for the Protection of Industrial Property was founded on the Paris Convention of 1883, Article 1 of which defines the objective of the Union. Under Article 16 bis (1) any of the Contracting Parties could extend the application of the Convention "to all or part of its colonies, protectorates, territories under mandates or any other territories subject to its authority, or any territories under its sovereignty" on notification in writing to the Government of the Swiss Confederation, the depositary of the Convention. Article 16(1) states that "Countries which are not parties to the present Convention shall be permitted to accede to it at their request".

Along with the Paris Convention, the Union administers five other Conventions: (1) The Madrid Arrangement concerning the Repression of False Indications of Origin, 1891; (2) The Madrid Arrangement for International Registration





of Marks of Manufacture or of Commerce, 1891; (3) the Hague Agreement for the International Registration of Industrial Designs and Models, 1925; (4) the Nice Convention concerning the International Classification of Goods and Services, and (5) The Lisbon text of the Union Convention, 1962. The Union's position on State succession is that no automatic continuity of its conventions and agreements can be presumed in the event of a change of sovereignty unless a formal declaration of continuity has been communicated by the new State to the Swiss Government. After independence, the Tanganyika Government wrote to the Bureau of the Convention inquiring about the necessary steps to be taken to secure its continued membership of the Union in view of the fact that the Paris Convention had been applied by the United Kingdom to Tanganyika since 1951. In response, the Legal Bureau of the Union stated:

In our view, such application does not automatically continue on the territory becoming independent and it is necessary for your Government to take some formal step in order to become an independent Member of the Union.<sup>65</sup>

This view is necessary since members are divided into classes according to the financial contributions made to the Union. The new States have responded either by filing declarations of continuity or by acceding to the relevant conventions

---

<sup>65</sup> Extract of the letter to the Government of Tanganyika, reproduced in I.L.A. Effect of Independence on Treaties (1965) pp. 244-245.



and agreements. Few of them have in so doing made reference to their devolution agreements with their predecessors. For instance, Indonesia in its note of accession made reference to her inheritance agreement with the Netherlands.<sup>66</sup> But this would seem to have been irrelevant in view of the official policy of the Union as well as the effect of Article 16 of the Constitution under which declaration of continuity, or adherence or accession is made. On the other hand, when Israel filed its instrument of accession in 1950, it declared that the Convention had been applied retrospectively to the date of independence.<sup>67</sup> Algeria, Uganda, Kenya, Tanganyika (Tanzania), Nigeria and Cyprus have acceded to the Convention. After the union of Egypt and Syria, the U.A.R. informed the Swiss Government that the two countries should be regarded as a single member and placed in class IV for purposes of contribution. This was communicated by the Swiss Government in a note of November 15, 1960 to the Bureau. The Arrangement of Madrid and the Hague Agreement had previously applied only to the Egyptian Province of the U.A.R., but the Government of the U.A.R. later informed the Bureau that these conventions would be extended to the Syrian Province of the Union.<sup>68</sup> However, on May 15, 1962, Syria, having separated

---

<sup>66</sup> La Propriete industrielle (1950) p. 222.

<sup>67</sup> Ibid., p. 23.

<sup>68</sup> Industrial Property Quarterly (April, 1960) p. 5 and (July, 1960) p. 3.



from the U.A.R., informed the Bureau that her individual membership should "revive".<sup>69</sup> Surprisingly, Singapore has been the only new State that has challenged the existing policy of the Bureau, contending that the convention continues in force in its territory irrespective of whether or not it has filed a formal declaration of continuity.<sup>70</sup> Other successor States that have filed declarations of continuity include Vietnam (1956), Malawi (1965), Zambia (1965), Congo (Brazzaville), Ivory Coast, Upper Volta, Chad, Malagasy Republic, Senegal, Laos, Gabon and the Republic of Cameroun. It is difficult to know whether the convention remains in force within the territory of those successor States which have not declared their attitude to it, in spite of the Bureau's presumption of lapse in the absence of such a declaration.

The International Union for the Protection of Literary and Artistic Works is administered jointly with the Union for the Protection of Industrial Property. Their policies overlap in many areas. Under Article 1 of the Constitutions of both Unions, for instance, the countries to which the Convention applies are held to constitute the "Union".<sup>71</sup> This is not the same as being a Contracting Party. A new State can

---

<sup>69</sup> Industrial Property Quarterly (May, 1962) p. 3.

<sup>70</sup> Industrial Property, Monthly Review (January, 1966) p. 55.

<sup>71</sup> For the Constitution see I.L.A., op. cit., Appendix 4, p. 317.





become a contracting party only by accession. Thus membership in the Union, as distinct from being a contracting party, is coterminous with the application of the Convention to a territory, metropolitan or non-metropolitan. The extension of the Convention to non-metropolitan territories was achieved under the authority of Article 26 of the Berne Convention of 1886, which serves as the constituent instrument of the Union. This was revised at Rome in 1928 and again at Brussels in 1948.

Unlike the International Union for the Protection of Industrial Property, however, the International Union for the Protection of Literary and Artistic Works takes the view that continuity of the application of the Convention is preserved by succession rather than by novation or adherence. It is denied that, owing to its special character as "a regulation treaty or treaty-law" mere change of sovereignty could terminate its continued applicability to the territory in question. Thus, M.G. Ronga, the Chief Legal Officer of the Union, in an article entitled, "The Position in the Berne Union of the Countries which recently became Independent"<sup>72</sup> states that:

It is absolutely in conformity with the general principles of international law to admit, in principle, the continued application by these new States of the Berne Convention, by reason of its character of regulation treaty or treaty-law, either tacitly, or by means of a

---

<sup>72</sup> In Le Droit d'Auteur (1960) p. 320; I.L.A., op. cit., p. 312.



declaration to that effect or by a conventional rule binding the new State to respect the treaties concluded by the State which formerly was responsible for its international relations.

This represented the policy of the Union until 1960. But the position was largely unsupported by the attitude and practice of the new States. The policy was eventually seen to be somewhat rigid; consequently, from 1960 on, it has been substantially modified and made more flexible. M. Claude Masouye<sup>73</sup> of the Legal Bureau of the Union spells out the new position as follows:

If the new States wish to exercise, on this point, their international sovereignty granted and acknowledged by the parent country, several decisions are offered to the free choice of their competent authorities. They can for example take over for their own account, in the full exercise of their sovereignty, the engagements taken not long since in their name and make a declaration of continued adherence, asking the Government of the Swiss Federation, supervising authority of the Convention, to communicate it to all the States members of the Union. They can also terminate their appurtenance to the group of the Unionist countries, but make simultaneously, with effect on the same dates, an act of free adhesion to the Convention, in accordance with Article 25(1). They can also simply denounce, within the provided times, the adhesion given previously in their name and therefore withdraw from the Union.

As to the juridical effect of this procedure, he contends that the simple declarative act amounts to an acknowledgement and confirmation of "a determined and pre-existent juridical situation", which serves to eliminate any uncertainty on the matter. There is little doubt that this new policy accords

---

<sup>73</sup> Masouye, "Decolonisation, Indépendance et Droit D'auteur", (Bureau Publication, Geneva, 1962) p. 28; I.L.A., op. cit., p. 316.



with the basic aim of the Union; by recognizing the importance attached by the new States to their "sovereign rights" and the expression of that right by free adhesion to international conventions, it has left open to the new State the choice of procedure by which it wishes to maintain the continuity of the Convention. It is the desire of the new States to take advantage of the protection of literary and artistic works afforded by this Convention. In 1959, Ceylon, which became independent in 1948, notified the Swiss Government of its adherence to the 1928 Act of Rome. This Convention had been applied by the United Kingdom to Ceylon in 1931, but under Article 28(3) of the revised Berne Convention (i.e., the Rome Act), a State wishing to become a member of the Union before July 1, 1951, could choose to adhere either to the Rome Act or the revised Brussels Act of 1948. After that date, it could become a party by adhering to the Brussels Act only. Ceylon's application posed a problem. However, the Swiss Government decided to interpret it as constituting a declaration of continuity on the ground that the Convention had been applied to Ceylon by the United Kingdom since 1931.

In 1960, the Director of the Union wrote to the newly independent States requesting them to indicate whether they continued to apply the Berne Convention on their territories. Korea, Cambodia and Vietnam denied that they were successor







to the Convention.<sup>74</sup> On the other hand, Niger, Mali, Dahomey, Congo (Kinshasa), Congo (Brazzaville), Gabon, Upper Volta, Senegal, Cameroon and Cyprus admitted continuity.<sup>75</sup> Israel chose to accede.<sup>76</sup> India, Lebanon, Morocco, Tunisia and Syria were signatories to the Rome Act before their independence. No problem seems to have arisen with regard to the continued application of that Act after they became independent. The new States affected by the Rome Act and which could continue to apply it are Burma, Cambodia, Cyprus, North and South Korea, Formosa, Ghana, Jordan, Laos, Malaysia, Nigeria, Somalia, North Vietnam and South Vietnam. They could also adhere to the Brussels Act if they wished. On the other hand, most of the French-speaking African States<sup>77</sup> were affected by the Brussels Act, and this could continue to apply to them.

As the above statement of policy shows, a new State can denounce the Convention if at a later date it finds itself unable to meet the obligations required by it. Indonesia denounced the Berne Convention on February 19, 1959,<sup>78</sup> in

---

<sup>74</sup> Le Droit d'Auteur (1960) pp. 334, 337 and 338.

<sup>75</sup> Ibid., (1966) p. 3.

<sup>76</sup> Ibid.

<sup>77</sup> Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Kinshasa), Dahomey, Gabon, Guinea, Ivory Coast, Madagascar Republic, Mali, Mauritania, Niger, Senegal, Togo, Upper Volta.

<sup>78</sup> Le Droit d'Auteur (1959) p. 79.



accordance with Article 29. The Convention had been applied by the Netherlands to the Dutch East Indies since April 1, 1913.<sup>79</sup> On achieving Independence, Indonesia had entered into an inheritance agreement with the Netherlands under which it undertook to assume obligations arising from international treaties concluded by the Netherlands on her behalf while she was still dependent.<sup>80</sup> However, the inheritance agreement also provided that Indonesia reserved the right to denounce such treaties at a future date, if they were found to be incompatible with the transfer of sovereignty. It is not clear whether Indonesia denounced the Convention on grounds of incompatibility with its sovereignty. Moreover, it has been contended that "in principle, such incompatibility does not exist in the field of protection of literary and artistic works", and that Indonesia's action in fact "presupposed the application of the Convention to Indonesia from independence until the date of denunciation".<sup>81</sup>

On January 12, 1961, the United Arab Republic denounced the Berne Convention on behalf of Syria which had formed a part of the Republic since 1958, with effect from January 12,

---

<sup>79</sup> Ibid.

<sup>80</sup> Van Panhuys, "La Succession de L'Indonesie aux Accords Internationaux conclus par les Pays-Bas avant . . . .", 2 Nederlands Tijdschrift Voor Internationaal Recht (1959) p. 55 et. seq.

<sup>81</sup> Ronga in Le Droit d'Auteur (1960) p. 320.



1962. But in September, 1961, before the denunciation was effective, the outbreak of revolution in the Syrian zone of the Union led to its secession from the U.A.R. and the declaration of its independence. The Bureau wrote to Syria inquiring whether the denunciation made on its behalf by the U.A.R. should be regarded as effective, or nullified by reason of the secession. Syria did not reply to this inquiry; the denunciation was therefore held to be effective, leading to the termination of Syria's membership as of January 12, 1962.

Membership in the Food and Agriculture Organization (FAO) can be acquired by submitting an application for membership and a declaration made in a formal instrument that the applicant country will accept the obligations of the constitution as in force at the time of its admission (Article II(2)). But the admission is subject to a two-thirds majority of the votes of members present, provided that those present constitute a majority of the Member Nations of the Organization. Paragraph 3 of Article II accords the Status of Associate member to any dependent territory, provided that the application is made by the authority responsible for its international affairs, who must in addition make a formal acceptance on behalf of the proposed Associate Member of the obligations of the Constitution. Thus, with regard to the effect of change of sovereignty upon membership in the Organization, there is no constitutional provision for automatic







inheritance of membership. The basic purpose of the maintenance of the associate status of dependent territories would appear to be to provide for the orderly transition of such territories, upon independence, to full membership.

On November 5, 1959, the following resolution was adopted by the FAO Conference in respect of Nigeria, Cyprus, Cameroon, Togo and Somalia, who were already Associate Members:

The Conference decides, with respect to the applications received concerning Cyprus, Nigeria, Cameroon, Togo and Somalia...

(b) to grant membership to each of the above nations that obtains the required two-thirds majority of the votes cast, on condition that the Government of each such nation shall submit to the Director-General, after the end of trusteeship or on accession to independence, an instrument confirming its desire to be a member of the Organization and its acceptance of the obligations of the Constitution;

(c) that such admission to membership shall take effect on the day of receipt of the aforesaid instrument if found valid, and that all Member Nations shall immediately be notified accordingly;

(d) in respect of Cyprus, Nigeria and Somalia only, that for the interim period, i.e., from the time the results of the ballot have been announced until accession to membership, each nation having obtained the required majority shall enjoy the privileges set out in paras. 3 and 4 of Article II, of the Constitution.<sup>82</sup>

By a subsequent resolution<sup>83</sup> of the Conference, Nigeria, Cyprus, Togo, Somalia, and Cameroon were admitted to full membership of the Organization. Chad, Madagascar (now Malagasy Republic),

---

<sup>82</sup> Res. 89/59, FAO Conference, Report of the Proceedings of the Tenth Session (1959) para. 664.

<sup>83</sup> Res. 92/59.



Gabon, Senegal and Sudan (now Mali) were admitted on the same day to associate membership,<sup>84</sup> their independence not being so imminent as in the case of the first group of countries. Tanganyika (now Tanzania) and Jamaica went through the same process before acquiring full membership.<sup>85</sup>

The Constitution of UNESCO, like that of the FAO, provided for the admission of a non-self-governing territory as an Associate Member of the Organization, upon application made on behalf of such territory by the Member or the authority having responsibility for the territory's international relations. But the admission was subject to the approval of a two-thirds majority of Members present and voting (Article II(3)). In general, membership in UNESCO is open to all members of the U.N. as of right. Non-Member States of the U.N., however, may be admitted to membership, on the recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.<sup>86</sup> Until 1956, the question of the legal implications of change of sovereignty relative to associate membership was not even raised, for the Constitution contains no provisions regarding the passage from Associate to full Member Status. Associate Members were deemed to continue,

---

<sup>84</sup> Res. 93/59.

<sup>85</sup> See FAO Conference, Report of the Proceedings, Eleventh Session, para. 557.

<sup>86</sup> Article II, paras. 1 and 2 of the Constitution of UNESCO.



after independence, to enjoy their rights and obligations as Associate Members. At the ninth session of the General Conference in 1956, representatives of certain Associate Members - Nigeria, Gold Coast (now Ghana), Malaya/British Borneo Group and British Caribbean Group - together with the United Kingdom held informal discussions concerning the effect of independence on associate membership of the Organization. It was then recognized that any application by the existing Associate Members to become full Member States of the Organization would have to be governed by the normal procedures regarding admission to full membership. Meanwhile, the new sovereign States would continue to enjoy their rights and assume the obligations of an Associate Member as defined by the General Conference at its Sixth Session in 1951.<sup>87</sup>

Ghana, on attainment of independence in 1957, was the first Associate Member to be admitted as a State Member, on April 11, 1958, following its admission to the U.N. on March 8, 1957. The Federation of Nigeria achieved independence on October 1, 1960. It was admitted to the U.N. on October 7, 1960, and on November 14, 1960, it became a State Member of UNESCO. Following its admission to the U.N. on September 20, 1960, Somalia became a State Member of UNESCO on November 15, 1960. Similarly, Tanganyika (now Tanzania),

---

<sup>87</sup> UNESCO General Conference, 6th Sess., 1951, 6C/Resolution 41.2.





Rwanda and Burundi were admitted as States Members in 1962.<sup>88</sup>

When the Federation of Malaya became independent on August 31, 1957, and was admitted to the U.N. on September 17, 1957, it became necessary for it to withdraw from Associate Membership of the former Malaya/British Borneo Group. Accordingly, the United Kingdom Government notified UNESCO on November 3, 1958 regarding the proposed withdrawal of Malaya from the Associate Membership of the Organization, effective from December 31, 1959. At the same time the United Kingdom filed a formal application for the admission of Singapore as an Associate Member from the date on which the former Malaya/British Borneo Group Associate Member would cease to exist.<sup>89</sup> On December 2, 1958, the General Conference of UNESCO adopted a resolution,<sup>90</sup> approving the withdrawal of Malaya and admitting Singapore to the status of Associate Member. Similarly, on the application of the United Kingdom Government, the Federation of the West Indies was admitted to Associate Membership on November 6, 1958.<sup>91</sup> This, in effect, dissolved the pre-existing British Caribbean Group and Federation of West Indies

---

<sup>88</sup> Tanganyika was admitted to U.N. on December 14, 1961; it became a Member of UNESCO on March 7, 1962. Rwanda and Burundi were admitted to U.N. on September 18, 1962 and became members of UNESCO on November 7 and 16, 1962, respectively.

<sup>89</sup> UNESCO Doc. 10C/53.

<sup>90</sup> Gen. Conf. Res. 10C/Resolution 0.54.

<sup>91</sup> 10C/Resolution 0.52.



which was formerly an Associate Member. However, on June 1, 1962, the Federation of the West Indies was dissolved by Order in Council. The Federation was, therefore, held, from the legal standpoint, to have ceased to exist as an Associate Member of UNESCO as of that date. In a note of August 28, 1962, the United Kingdom Government informed the Director-General of UNESCO of that fact. Trinidad and Tobago as well as Jamaica were admitted to the United Nations on September 18, 1962. Following this, the former became a State Member of UNESCO on November 2, and the latter on November 7, 1962.

Kuwait, though a non-Member State of the U.N., applied on April 25, 1960, for membership in UNESCO in conformity with the provisions of Article II(2) of the UNESCO Constitution. In accordance with the then existing provisions of Article II of the Agreement between the U.N. and UNESCO (that Article having been deleted with effect from December 10, 1962) the application was transmitted to the Economic and Social Council of the United Nations for consideration. At its thirtieth session, the ECOSOC decided that it had no objection to the admission of Kuwait to UNESCO. On this basis, the Executive Board of UNESCO adopted a resolution at its fifty-seventh session recommending the admission of Kuwait to the General Conference. The final decision was taken by the Conference at its eleventh session on November 15, 1960, admitting Kuwait



as a full Member-State of UNESCO.<sup>92</sup>

At this point, it seems relevant to discuss one or two examples of other international organizations where, although succession upon independence has not been admitted, application by a new State for membership is required de novo. The International Institute of Refrigeration is one such Organization. It was founded in 1920, but its Constitution was revised in 1954. Under Article III members of the Institute, besides the Contracting Parties, include:

(c) Countries which are not parties to the present Agreement if such Countries accede to this Agreement and if their admission is accepted by the Executive Committee;

(d) Territories not included in the appended list, if notified to the Institute by the Contracting Party responsible for their international relations and if their admission is accepted by the Executive Committee.

Before they achieved independence, India, Madagascar, Morocco, Tunisia, Algeria and French West Africa took part in the Institute as full members. But the Institute's policy with respect to the effect of change of sovereignty on membership has been that all ex-colonies must re-apply for membership on becoming independent. Pakistan and India were required to do so in 1947 and 1950 respectively. Upon the dissolution of the Federation of Mali in 1960, both Senegal and Mali were asked to apply for membership de novo.<sup>93</sup> The following new States

---

<sup>92</sup> UNESCO Gen. Conf., 11C/Resolution 0.51.

<sup>93</sup> See I.L.A. Handbook, op. cit., p. 263.





have all been admitted to membership of the Institute in accordance with the above requirement: Algeria, Central African Republic, Chad, Gabon, Indonesia, Ivory Coast, Mali, Mauritania, Niger, Nigeria, Senegal and South Vietnam.

The other example is the International Telecommunication Union (ITU). It was founded at Paris on May 17, 1865, as the International Telegraph Union; the former title was adopted at the Madrid Conference in 1932. The ITU currently operates on the basis of the International Telecommunication Convention, signed in Geneva in 1959, and which came into effect on January 1, 1961. The Metropolitan countries were authorized to sign, ratify or accede to it on behalf of their colonial territories.<sup>94</sup> The dependent territories could hold associate membership, but application for such membership had to be made on their behalf by the authority responsible for their international relations, and was subject to approval by a majority of the members of the Union. However, many of the dependent States had been listed as full members of the Union by virtue of the signature of their administering authorities, in their capacity as Contracting Members, in accordance with Article 1 (2)(a), for the dependent States were regarded as "forming part of a group of territories constituting a Member of the Union."<sup>95</sup> These territories included Belgian Congo (now Congo, Kinshasa); Ruanda-Urundi (now Rwanda and Burundi); Overseas States of the

---

<sup>94</sup> Article 1(3)(c).

<sup>95</sup> Article 1 paragraph 4.



French Community and French Overseas Territories; Portuguese Overseas Provinces; Spanish Provinces in Africa; Overseas Territories of the United Kingdom, and Territories of the United States.

But in so far as the succession of the new States is concerned, the official policy of the Union is that when a State becomes independent, it ceases to be part of the group of territories to which it belonged. It can, therefore, become a Member of the ITU only by submitting application for membership de novo in accordance with the terms of Article 1 paragraph 2(b) of the Convention. Inheritance of membership by a new State cannot take place. Thus, the Republic of the Congo (Kinshasa), the Republic of Rwanda and the Kingdom of Burundi could not inherit the membership status of the Belgian Congo and Territory of Ruanda-Urundi. The membership of these territories having lapsed upon the independence of the three States, they were required to re-apply for membership in the Union. Again, prior to the accession to independence, the French Protectorates of Morocco and Tunisia were treated as a single Member of the Union by virtue of French signature of the Buenos Aires Convention of 1952. But on achieving independence in 1956, as separate States, both Morocco and Tunisia had to file new instruments of adhesion to the Convention. The Buenos Aires Convention has, however, been superseded by the Geneva Convention of 1959. These two States are now parties to the Geneva Convention.



From the above survey, there seems to be no consistent rule or uniform principle guiding the practice of all the international organizations as regards the problem of succession of new States to membership.<sup>96</sup> The approach of each appears, on the face of it, to be determined by its conception or interpretation of its functions and purposes as embodied in its constitution. Thus, while some, such as the I.L.O., are disposed towards admitting by way of succession upon independence, others, such as the ITU, prefer that new States apply for membership de novo. We have further seen that even those organizations whose constitutions do not expressly provide for succession have tended to admit succession upon independence. The African Postal and Telecommunications Union is a case in point.

The attitude of the new States themselves is no less enigmatic. While some are prepared to claim automatic succession to membership in certain international institutions, even where no constitutional provision has been made for it, others

---

<sup>96</sup> For a contrary opinion see Tatsuro Kunugi, "State Succession in the Framework of GATT", 59 A.J.I.L. (1965) p. 228, n. 74, where he maintains that "the well-publicized U.N. decisions on the admission of Pakistan have exerted undue influence upon the subsequent decisions of various international organizations". While this is true in the case of the GATT, ICAO and a few other organizations, it would seem that other international organizations, as shown by this study, have evolved a much more flexible policy, in keeping with their purposes and objectives, regarding the admission of new States to membership.







have flatly refused to acknowledge succession on the ostensible ground that this is incompatible with their newly acquired sovereignty and that the question of treaty relations requires the free exercise of the State's sovereign will. As such, they prefer to file new instruments of adhesion, accession, or ratification as the case may be.

Yet, in spite of these theoretical or technical differences in approach between the organizations themselves and the new States, it is widely recognized that, in Paul Reuter's words, "the real sociological justification for international organizations lies in common interests".<sup>97</sup> It is the recognition of the permanence of the community interest fostered by such organizations which induces a general acknowledgement of the desirability for the maintenance of the stability and continuity of the legal regime generated by the organizations. The organizations involved have responded by developing a more flexible approach to facilitate the admission of the new States to membership. In so doing, both the community interest represented by the legal regime instituted by the organizations and the particular interest of the new States become accommodated. This flexibility is indicated by the fact that even where succession to membership is constitutionally provided for, as in the case of the GATT, regard is still paid to the intention of the new States, for there is no insistence upon

---

<sup>97</sup> Paul Reuter, International Institutions (Trans. by J.M. Chapman, 1958) p. 215.



automatic succession.<sup>98</sup> On the contrary, the new State is given the right of option as to whether it wishes to succeed or not. While this does not reflect the common approach of all the international organizations, it is one that may well encourage a more positive response on the part of the newly independent States. Nevertheless, the new States appear fully aware that their active participation in international organizations is likely to contribute not only to their effectiveness and viability, but also to their capacity to serve a wider community purpose.

---

<sup>98</sup> Kunugi, loc. cit., n. 96 above, p. 285.



## CHAPTER VI

### SUCCESSION TO "LOCALIZED" OR "DISPOSITIVE" TREATIES

#### 1. The Theory of Dispositive Treaties

There are certain types of treaties which are juristically regarded as creating "real" or "localized" obligations and hence surviving changes of sovereignty. Such treaties are often described as "dispositive".<sup>1</sup> Treaties may be considered as dispositive or localized if they "are in the nature of objective territorial regimes created in the interests of one nation or the community of nations; are applied locally in virtue of territorial application clauses;

---

<sup>1</sup> There is by no means a universal agreement on the appropriateness of this term. McNair, who prefers the expression "treaties creating local obligations", criticizes it as confusing on the ground that the term is used in French to refer to the operative part of a judgment (Law of Treaties (1961), p. 656). On the other hand, both O'Connell and Lester doubt whether the term "localized" is any less confusing as a criterion for determining the subrogation of treaty obligations (O'Connell, State Succession, Vol. 2 (1967) p. 15; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) pp. 489, 498.

Westlake is reputed to have employed the term first in reference to treaties creating obligations of a permanent character connected with territory. But he and Wheaton also used the rather confusing expression "transitory" as a synonym of "dispositive". See Westlake, International Law, Part I (1904) pp. 60-62; Wheaton, Elements of Int. Law, Part III (1866) p. 340.





touch or concern a particular area of land".<sup>2</sup> Their fundamental legal effect consists in the permanence of the territorial obligations created, which exist independent both of the treaty which created them and of the "personality of the State exercising sovereignty".<sup>3</sup> It follows that "where real rights have been created which attach to a particular territory, these will subsist if the territory becomes part of a new State".<sup>4</sup> As Hall puts it,

...rights possessed in respect of the lost territory, including rights under treaties relating to cessions of territory and demarcations of boundary, obligations contracted with reference to it alone, and property which is within it, and has therefore a local character, or which, though not within it, belongs to state institutions localised there, transfer themselves to the new state person.<sup>5</sup>

Treaties concerning the neutralization or demilitarization of a territory or region, navigation on rivers, rights of transit over territory and boundary lines are generally included in

---

<sup>2</sup> I.L.A., Effect of Independence on Treaties (1965) p. 352.

<sup>3</sup> O'Connell, The Law of State Succession (1956) p. 49.

<sup>4</sup> R.Y. Jennings, The Acquisition of Territory in International Law (1963) p. 11.

<sup>5</sup> Hall, A Treatise on International Law (8th ed., 1924) p. 115.



the class of dispositive treaties.<sup>6</sup> It has been observed, however, that a general obligation may flow from treaties as a result of universal acceptance or acquiescence in their terms by all States and not from the treaty itself.<sup>7</sup> In this sense, the continued binding authority of a legal regime created does not necessarily depend upon the continuation in force of the treaty as a contractual instrument.<sup>8</sup>

A dispositive treaty often operates as a kind of conveyance, so that its provisions become executed once they have been ratified, and the obligations created continue to bind the land irrespective of changes of sovereignty over it. A further legal effect of dispositive treaties is that they constitute, under certain conditions, a limitation upon the territorial sovereignty or jurisdictional competence of the burdened State. "State servitudes" have been specifically

---

<sup>6</sup> Oppenheim, International Law (8th ed., 1955) p. 159.

Dispositive treaties "are to be distinguished from so-called personal treaties, that is, treaties which attach to the person of the State and the continued validity of which is dependent upon the continued existence of the contracting parties.... There is no succession to treaty obligations and rights, apart from such succession that may result from dispositive treaties". Kelsen, Principles of International Law (ed., Robert W. Tucker, 1952) p. 418, n. 111. See also de Visscher, Theory and Reality in Public Int. Law (Tran. P.E. Corbett, 1968) pp. 179-180.

<sup>7</sup> Quincy Wright, "Conflicts between International Law and Treaties", 11 A.J.I.L. (1917) p. 573.

<sup>8</sup> C.W. Jenks, "State Succession in Respect of Law-Making Treaties", 29 B.Y.I.L. (1952) p. 107.



considered as possessing this effect.<sup>9</sup> This implies that a State is restrained from doing acts it might otherwise do or allow on that portion of its territory affected by the treaty; conversely it must refrain from preventing acts on the part of another State within the affected zone, which it might ordinarily prevent or forbid.<sup>10</sup>

The principle that "real" rights or "localized" obligations pass to successor States is not only given currency in theory, but it appears to enjoy the support of international arbitral and judicial decisions. Before examining the various kinds of dispositive treaties, it seems apposite to show the manner in which international tribunals have dealt with the notion of "real" rights or "localized" obligations in relation to the problem of State succession.

In the case of the Free Zone of Upper Savoy and the District of Gex, 1932,<sup>11</sup> the Permanent Court of International Justice decided in favour of the binding quality of permanent territorial arrangements. Under the Treaty of Turin of March 16, 1816<sup>12</sup> between Sardinia and Switzerland, the fron-

---

<sup>9</sup> Reid, International Servitudes in Law and Practice (1932) p. 26; Vali, Servitudes of International Law (2nd ed., 1958) pp. 17-18.

<sup>10</sup> Pitman B. Potter, "The Doctrine of Servitudes in International Law", 9 A.J.I.L. (1915) p. 628.

<sup>11</sup> P.C.I.J., Series A/B, No. 46, p. 145.

<sup>12</sup> Hertslet, The Map of Europe by Treaty, Vol. 1, p. 421.







tier between the two countries was delimited. Restrictions were made regarding the imposition of customs dues by Sardinia in the District of St. Gingolph. On September 9, 1829, the Sardinian Court of Accounts issued a manifesto further extending the restrictions placed on the District. By the Treaty of March 24, 1860,<sup>13</sup> Sardinia ceded to France the Free Zone of Upper Savoy, including the District of St. Gingolph. On acquisition of the territory, France continued to observe the restrictions. However, in 1919, she suggested to Switzerland that the regime created with respect to the Zones should be revised. This was accepted by Switzerland and the proposal was embodied in Article 435 of the Treaty of Versailles,<sup>14</sup> which provided that the two countries were to come to an agreement with a view to settling between themselves the status of the Free Zones. However, the two countries were unable to reach agreement in the ensuing negotiations. The French then took the view that the Free Zones and

---

<sup>13</sup> Ibid., Vol. II, p. 1430.

<sup>14</sup> B.F.S.P., Vol. 112, p. 1; Cmd. 153; Hudson, International Legislation, Vol. 1, p. 1; B.T.S., 1919, No. 4.



the neutral zones had been abrogated by the Treaty of Versailles itself.<sup>15</sup> Accordingly, on November 10, 1923, the French extended their customs line to the frontier between Switzerland and France, thus embracing the zones. Switzerland refused to accept the French action as valid under international law.

On October 20, 1924, both countries agreed to submit the case to the Permanent Court for judicial determination. The question to be decided was whether the status of the Free Zones could be abolished without the express consent of Switzerland. In its counter memorial,<sup>16</sup> the Swiss Government contended that dispositive treaties create "real" rights, and that "real" rights, in international law, are those which are connected with a territory and hence valid erga omnes. On the other hand, the French argued that even if the Treaty of Versailles did not have the effect of abolishing the zones, France could still denounce the regime by virtue of the principle rebus sic stantibus.

---

<sup>15</sup> Article 435 of the Treaty of Versailles was interpreted as constituting the application of the principle rebus sic stantibus. The validity of this principle was, in effect, confirmed by Article 19 of the Treaty of Versailles (League Covenant) which permitted changes in or the abrogation of a treaty said to have become inapplicable owing to the emergence of a new situation fundamentally destructive of the raison d'etre of the treaty. Nonetheless, this could only be done as a result of a unanimous vote of the Assembly of the League of Nations, and not by means of a unilateral application of the principle by a State.

<sup>16</sup> P.C.I.J., Series "E", Free Zones, etc., Vol. 3, p. 1654.



The Court in its judgment relied both upon the fact of French recognition of the special status established during the period of Sardinian sovereignty over the District, and upon the character of the rights created by international agreement which are locally connected with the territory in question. It said, inter alia:

With particular regard to the zone of Saint Gingolf, the Court, being of opinion that the Treaty of Turin of March 16th, 1816, has not been abrogated by Article 435, paragraph 2 of the Treaty of Versailles, with its Annexes, the same is true as regards the Manifesto of the Royal Sardinian Court of Accounts of September 9th, 1829. This Manifesto, moreover, which was issued in pursuance of royal orders, following upon the favourable reception by H.M. the King of Sardinia of the request of the Canton of Valais based on Article 3 of the said Treaty of Turin, terminated an international dispute and settled with binding effect as regards the Kingdom of Sardinia, what was henceforward to be the law between the parties. The concord of wills thus represented by the Manifesto confers on the delimitation of the zone of Saint Gingolph the character of a treaty stipulation which France must respect as Sardinia's successor in sovereignty over the territory in question.<sup>17</sup>

In upholding the Swiss position the Court clearly affirmed the principle of State succession especially as relates to territorial establishments, whether of an economic or political character. In effect, it maintained that such regimes are prima facie valid for parties as well as third States.<sup>18</sup>

In a more recent case concerning the Right of Passage over Indian Territory, 1960,<sup>19</sup> the International Court of

---

<sup>17</sup> P.C.I.J., Series A/B, No. 46, p. 145.

<sup>18</sup> Ibid., p. 147.

<sup>19</sup> I.C.J. Reports, 1960, p. 6.







Justice also recognized the real and permanent character of territorial rights created by dispositive treaties, and affirmed that obligations flowing from such treaties remain binding upon successor States. In this case, Portugal claimed before the Court that the Treaty of Punnam of 1779, between her and the Marathas gave her a right of passage between Daman and its enclaved territories of Dadra and Nagar Haveli comprising the right of transit for persons and goods together with her armed forces, without any restrictions or difficulties, and in a manner and to the extent necessary for the effective exercise of Portuguese sovereignty over the territories concerned.<sup>20</sup> It, therefore, alleged that India had refused to recognize the obligations which this right entailed. Nevertheless, as will be shown later,<sup>21</sup> Portugal did not base its claim before the Court upon the existence of an international servitude imposing a duty upon India.

The Court, however, found that the agreement on which Portugal had relied granted rights amounting merely to a revenue grant and not a grant of sovereignty together with a right of passage, and that its sovereignty became established only as a result of British recognition of it. But it held that the rights granted, since they were accepted over a long period of time unaffected by the change of regime,

---

<sup>20</sup> Ibid., p. 9.

<sup>21</sup> See infra p. 18.



constituted real rights which remained binding upon successor States.<sup>22</sup> In relation to the right of passage, the Court stated:

With regard to private persons, civil officials for goods in general, there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and correlative obligation.<sup>23</sup>

In so far as the passage of armed forces was concerned, the Court maintained that this depended entirely upon the discretionary authority of the territorial sovereign and that no such right existed in favour of Portugal.<sup>24</sup>

On the basis of the foregoing judicial decisions, it is possible to maintain, in principle, that particular conventions of a dispositive character can create "real" rights within the territory of one State in favour of another State or group of States. Implicit in this territorial notion of "real" rights is their prima facie validity and binding effect upon successor States. In view of their importance and unquestionable relevance to current theoretical discussion of the law of State succession, we shall proceed to

---

<sup>22</sup> I.C.J. Reports, 1960, pp. 37-39.

<sup>23</sup> Ibid., p. 40.

<sup>24</sup> Ibid., p. 43.



examine the various kinds of dispositive treaties and to assess the practice of the new States in respect of them.

Dispositive treaties may be divided into three classes, namely, treaties establishing international servitudes, boundary treaties, and capitulation treaties. The description of capitulations as dispositive treaties, particularly when they are identified with international servitudes, has been disputed by some writers. Miss Reid, for instance, argues that they are not "real" rights and that, depending as they are "for their existence upon differences in the legal systems and types of civilization of the States concerned, their raison d'etre might vanish at any time by a change of sovereignty affecting the territory of the burdened State".<sup>25</sup> Capitulations are an institution whereby Western Powers exercised extra-territorial jurisdiction over their own nationals in Turkey and the oriental countries. Miss Reid, however, concedes that this system of treaty relations created rights in favour of the grantee States more permanent than ordinary treaty obligations.<sup>26</sup> Nevertheless, international practice respecting such treaties has been so inconsistent that it seems reasonable not to treat them as dispositive treaties, in the sense that obligations created under them remain valid and binding upon successor States.

---

<sup>25</sup> H.D. Reid, International Servitudes in Law and Practice (1932) p. 23.

<sup>26</sup> Ibid.





They may be regarded, stricto sensu, not as territorial rights, that is, rights in rem, valid against the whole world,<sup>27</sup> but as "merely personal obligatory relations" between two or more States, which are "dependent upon the political organization of the contracting parties and even subject to modification when the internal organization of one of them changes".<sup>28</sup> Such rights are "territorial" only to the extent that they enable one State to exercise jurisdiction within the territory of another.

The transitory character of such obligations is illustrated by a long line of international diplomatic practice. Japan terminated the rights of foreign powers in Korea by mere unilateral declaration to that effect when it acquired sovereignty over the latter in 1910.<sup>29</sup> Similarly, Italy abrogated all capitulatory rights in Eritrea and Tripoli after it assumed control of those territories.<sup>30</sup> In the case of the Nationality Decrees in Tunis and Morocco,<sup>31</sup> France contended before the Permanent Court of International Justice that all capitulatory rights in those countries in

---

<sup>27</sup> Vali, Servitudes of Int. Law (2nd ed., 1958) pp. 22-23; McNair, Law of Treaties (1961) p. 656; Salmond, Jurisprudence (1924) p. 358.

<sup>28</sup> Reid, loc. cit.

<sup>29</sup> F.O. 371/877.26451/988/10/12.

<sup>30</sup> Hackworth, Digest of Int. Law, Vol. 5, p. 365.

<sup>31</sup> P.C.I.J. (1923) Series C, No. 2, p. 128 et. seq.



favour of foreign powers had lapsed upon her assumption of protectorate over them. Again, after the British took over the temporary administration of Cyprus in 1878, there arose the need to introduce on the island sweeping judicial reforms which would obviously affect existing capitulatory rights in favour of foreign powers. It was thus necessary first to seek the opinion of the Law Officers of the Crown with regard to the propriety of such measures under international law. While the Law Officers admitted that it could be contended that under the existing arrangement "Her Majesty has no right to subject to the jurisdiction of the Courts in Cyprus the subjects of States having capitulations or treaties with the Sultan", they emphasized that "the Capitulations are not to be regarded so much as actual Treaties between nation and nation as licenses granted by the sovereign power of the Porte, and necessarily terminable when that Government parted with legislative and judicial authority".<sup>32</sup> Furthermore, the British Foreign Secretary took the firm view that if Cyprus had been completely ceded to Britain, "none of the liabilities imposed by the Capitulations or by any other engagements of the Sultan would have been taken over with it by England".<sup>33</sup>

---

<sup>32</sup> F.O. Confidential Papers (4328), No. 22; O'Connell, The Law of State Succession (1956), Appendix No. 38, p. 332.

<sup>33</sup> F.O. 78/3373.



The question of the survival of the capitulations granted by the Ottoman Empire arose again in 1947 in connection with the termination of the British mandate in Palestine. Article 8 of the mandate had stipulated that such capitulations would not be applicable in Palestine during the tenure of British administration, but that when the Mandate was ended, they would be re-established in their entirety, subject only to such modifications as the powers affected might agree upon.<sup>34</sup> However, when the British intimated that the mandate would end in 1947, the United Nations General Assembly, fearful that the Powers which had enjoyed such rights prior to the establishment of the Mandate might seek to reinstate them in accordance with the relevant provisions of Article 8 of the Mandate, called upon all the States concerned to "renounce any rights pertaining to them to the re-establishment of such privileges and immunities in the proposed Arab and Jewish States and the City of Jerusalem".<sup>35</sup>

---

<sup>34</sup> L.N., Official Journal (1927) p. 1007.

<sup>35</sup> U.N. Doc. 19/516, November 25, 1947, p. 23.  
It should be noted that the United States consistently took the view that changes in sovereignty over portions of the former Ottoman Empire could not affect her rights by Capitulations. This way, she sought to assimilate capitulations to "real" rights which impress a permanent character upon the territory of the grantor State. See, e.g., Foreign Relations of the United States, Vol. 2 (1920) pp. 676-78; Ibid., Vol. 2 (1921) p. 106; Ibid., Vol. 2 (1922) pp. 268-72; cf. Hackworth, Digest of International Law, Vol. 2, pp. 524, 526; Vol. 5, p. 365; Moore, Digest of International Law, Vol. 5, p. 352. In the Case concerning Rights of Nationals of the United States of America in Morocco this American view (continued on p. )





These and other examples are authority in support of the contention that capitulations have not been universally accepted as constituting an indisputable category of dispositive treaties which devolve automatically upon successor States.

## 2. Treaties Creating International Servitudes

The institution of international servitudes probably remains the most controversial aspect of the law of nations. But the fact that authorities are irreconcilably divided on this subject does not imply that the concept is entirely foreign to international law; it merely reflects the chronic uncertainty and extreme caution which bedevil the practice of States. Whether or not it is accepted as valid in principle and invoked in practice by a State would appear to depend upon the particular circumstances. Since servitudes

---

35 (continued)

appeared to have been confirmed when the International Court stated that a State which emerges from protected status remains bound by treaties especially made for it. I.C.J. Reports, 1952, p. 176 at p. 188.

On the other hand, after Spain ceded the Sulu Islands to the U.S. in 1898, Britain and Germany notified her to the effect that the protocols granting them rights of commerce in the Islands were of a local character, attaching to the territory now under the sovereignty of the United States, and that those rights must be respected. But the U.S. firmly denied that such rights were in any way territorially connected with the Islands. Moore, Digest of Int. Law, Vol. 1, p. 331; Vol. 5, p. 352.



emanate from conventional law and are possessed of a permanent and absolute quality which renders them, at least in theory, automatically transmissible to successor States, we shall first examine the general position of the concept in international law, followed by analysis of relevant judicial and arbitral pronouncements involving international servitudes. Further, a critical appraisal will be attempted of the attitude of the new States with regard to this specific class of treaties.

International servitudes have been defined as "those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State".<sup>36</sup> It is further stressed that the subjects of international servitudes are "States only and exclusively",<sup>37</sup> since the restrictions which they impose upon the territorial supremacy of the grantor State are intended solely to serve the purpose or interest of the grantee State.

In a useful study, Potter noted that "the most outstanding feature of the law of servitudes in international relations is the territorial element.... Indeed if the term has any place at all in jural language it is here in regard

---

<sup>36</sup> Oppenheim, International Law, Vol. 1 (ed. by Lauterpacht, 8th ed., 1955) p. 536.

<sup>37</sup> Ibid., p. 538.



to 'territorial obligations'. Ordinarily, a territorial obligation is by its nature permanent and therefore a servitude".<sup>38</sup> This territorial conception of international servitude implies that it creates a right in rem for the use and benefit of some other State or States,<sup>39</sup> and distinguishes it from "personal State servitudes" which create only "personal" or "relative" rights.<sup>40</sup> While the latter, based as they are upon the personal relations of the contracting parties, may lapse with the disappearance of one of the parties, the former, being of an absolute and permanent character, remains unaffected by changes of sovereignty. Hence, any State which succeeds to sovereignty over the area affected becomes ipso facto the passive subject of the right.<sup>41</sup>

As Lauterpacht<sup>42</sup> has pointed out, any interpretation of an international obligation as a servitude must be based on the clear intention of the parties. This intention may be inferred "from the term 'servitude' having been expressly

---

<sup>38</sup> Potter, "The Doctrine of Servitudes in International Law", 9 A.J.I.L. (1915) p. 628.

<sup>39</sup> Reid, International Servitudes in Law and Practice (1932) p. 21.

<sup>40</sup> Vali, Servitudes of International Law (1958) p. 25.

<sup>41</sup> Ibid., p. 19.

<sup>42</sup> Lauterpacht, Private Law Sources and Analogies of International Law (1927) pp. 122-123.





used in a treaty; from other clear provisions of the treaty, for instance, to the effect that the restriction should last for all time, or that it should remain unaffected by changes of territorial sovereignty; from the character of the international agreement in question, i.e., if the number of signatories is such that the convention assumes the character of an act of international legislation creating a rule of universal international law; from the fact that a certain restriction has been repeatedly taken over by successive sovereigns, so that the question as to its real character has been answered in the affirmative by actual observance".

On the other hand, critics<sup>43</sup> of international servitudes maintain that, since sovereignty is "absolute and indivisible", a State cannot derogate from its sovereignty by an international contract. The very right of entering into treaty relations, they argue, is an attribute of State sovereignty, and, even though a State may grant to another the right to exercise some authority in relation to its territory, such grant of right cannot be construed as a cession of territory. On the contrary, it must be interpreted restrictively, for in any case involving derogation of a State's national sover-

---

<sup>43</sup> See, e.g., McNair, "So-called State Servitudes", 6 B.Y.I.L. (1925) pp. 111-127; A.B. Keith, The Theory of State Succession (1907) p. 22; G. Crusen, "Les Servitudes internationales", 22 Hague Recueil (1928) p. 31; Ernest Nys, Le Droit international, Vol. II (1912) p. 271; A.J. Esgain, "Military Servitudes and the New Nations", in O'Brien (ed.) The New Nations in International Law and Diplomacy (1965) p. 42.



eignty by international servitude, the presumption must be in favour of the servient State. Again, the concept is often criticized on the ground that it is an unwarranted importation of the Roman civil law notion of praedial rights into international law. The former, it is contended, operated under the obsolete feudal conditions of earlier times during which the territory of the State was regarded as the property of the sovereign, and the concepts of praedium dominans and praedium serviens formed an accepted principle of legal relationships.<sup>44</sup> In view of the inconsistency of international servitude with the doctrine of indivisible sovereignty, it is maintained that a State servitude can only be created by a formal international contract, and that any claim to a grant of such right must be predicated on the express terms of such a contract. Thus, Hall describes international servitudes as "the creatures not of law but of compact".<sup>45</sup>

In judicial practice, international tribunals appear to have studiously avoided making a positive declaration regarding the doctrine of international servitude, even though the concept may be accepted in principle. In the North Atlantic Fisheries case, 1910,<sup>45a</sup> in which the United

---

<sup>44</sup> On this point, see Lauterpacht, op. cit., note 42 above, p. 121 et. seq.

<sup>45</sup> Hall, A Treatise on International Law (8th ed., 1924) p. 203.

<sup>45a</sup> 11 R.I.A.A., p. 167



States contended that fishing rights granted it by Britain under the Treaty of 1818 amounted to servitude rights in its favour, the Tribunal, however, held that no rights exactly analogous to the praedial rights of Roman law have been recognized in contemporary international law and that the apportionment of sovereignty was generally inadmissible in the practice of States.

In the Wimbledon case<sup>46</sup> the Permanent Court was to deal partly with the question of international servitudes. By virtue of Article 380 of the Treaty of Versailles,<sup>47</sup> the Kiel Canal, an internal waterway of Germany, was transformed into an international waterway which should afford free access to vessels of "all nations at peace with Germany". However, during the Russo-Polish war of 1920, Germany barred the SS Wimbledon, an English steamer chartered by a French company for shipment of munitions for the use of the Polish Government, from passing through the canal. In 1923, Great Britain, France, Italy and Japan brought an action before the Permanent Court of International Justice against Germany, asking for a declaration that Germany had acted in violation of

---

<sup>46</sup> P.C.I.J. (1923), Series A, No. 1, p. 24.

<sup>47</sup> B.F.S.P., Vol. 112, p. 1; Cmd. 153; B.T.S., 1919, No. 4.







Article 380<sup>48</sup> of the Treaty of Versailles, and claiming compensation for the damage resulting from her action to the owners of the Wimbledon.

Judge Schucking, the Ad hoc German judge, in his dissenting opinion, admitted that the Treaty of Versailles, 1919, guaranteeing the right of passage through the Kiel Canal constituted an international servitude involving a restriction upon the German sovereignty; consequently, the treaty must be interpreted restrictly to limit as little as possible the sovereignty of the servient State.<sup>49</sup> Nonetheless, in reference to the concept of international servitude, the Court held that it was

not called upon to take a definite attitude with regard to the question... whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law. Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation... the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation.<sup>50</sup>

It is to be observed, however, that, although the Kiel Canal regime is often cited as an example of international servitude, Article 380, creating the regime, was unilaterally

---

<sup>48</sup> Article 380 of the Treaty of Versailles provided that "the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality".

<sup>49</sup> P.C.I.J. (1923), Series A, No. 1, p. 43.

<sup>50</sup> Ibid., pp. 24-25.



repudiated by Germany on November 14, 1936.<sup>51</sup> From then on, regulations were issued prohibiting passage of foreign warships without authorization. The signatory Powers of the Treaty of Versailles appeared to have acquiesced in the German action. When in the Kiel Canal Collision case, 1950,<sup>52</sup> Denmark invoked Article 380 of the Treaty of Versailles in an attempt to exclude the collision case from the jurisdiction of German courts, the German Supreme Court of the British Zone, while questioning whether the Kiel Canal has in fact remained an international waterway, held that, even if by virtue of Article 380 of the Treaty of Versailles the Kiel Canal must be regarded as an international waterway open to the vessels of all nations at peace with Germany, the provisions of that treaty did not exempt a vessel which sails through the Canal from German law and German jurisdiction.

The above examples of judicial rulings would appear to indicate that, even though the concept of international servitude is probably acknowledged in principle, international tribunals have consistently refused to endorse it judicially, perhaps for fear that such might encourage some States to abuse it and to ultimately jeopardize the very independence and territorial integrity of other States. The controversial nature of this concept was dramatically brought

---

<sup>51</sup> R.I.I.A. Docs. 1936, p. 284.

<sup>52</sup> I.C.J. Reports, 1950, p. 133.



out by Portugal in the case of the Right of Passage over Indian Territory (Preliminary Objections), 1957.<sup>53</sup> Portugal stated that her claim before the International Court was not based on the theory of international servitudes "because the theory lacked coherence, and it was impossible even for jurists to agree on the very definition of international servitudes, or on what constitutes their characteristic features, or on what makes it possible to distinguish them from other obligations to which a State may be subject in the exercise of its territorial jurisdiction, and because an international servitude would imply a dismemberment of territorial sovereignty".<sup>54</sup>

This unsettled character of international servitude has not prevented it from being employed in modern times in certain forms of treaty relations. An example of its use is the final settlement of the Tacna-Arica controversy of 1929, between Chile and Peru.<sup>55</sup> This settlement provided that certain canals passing through Chilean territory "shall enjoy the most complete servitude in perpetuity in favour of Peru". Under it, Peru acquired the right to widen the canals, change

---

<sup>53</sup> I.C.J. Reports, 1957, p. 125.

<sup>54</sup> T.O. Thomas, The Right of Passage over Indian Territory (1959) p. 37, cited by A.J. Esgain, "Military Servitudes and the New Nations" in O'Brien (ed.) The New Nations in International Law and Diplomacy (1965) p. 43, n. 8.

<sup>55</sup> 23 A.J.I.L. (1929), Supplement, p. 183.







their course, and even to appropriate all their waters flowing through Chilean territory.<sup>56</sup> In August, 1960, France signed an "Accord of Co-operation on Matters of Defence" with the incipient Federation of Mali.<sup>57</sup> Under this Accord, the latter ceded to France the strategic base of Cap-Vert (Dakar-Thies), the bases of St. Louis and Kati, and also the air bases of Bamako, Gao and Tessalit. The Mali Federation undertook, under Article 9 of the Accord, to respect the "existing servitude in favour of France" for the use of the bases in question. Similarly, in the Accord between France and the Malagasy Republic in 1960,<sup>58</sup> the Malagasy Government ceded to France the strategic base of Diego Suarez and committed itself to respect "the existing servitudes in favour of France for the use of the base and other French military installations, and to permit modifications in the servitudes should this be required by technical necessity. The Accord clearly stipulates that the zones covered by these "defence servitudes" include Diego Suarez extending to the District of Anivorano-North, and that other "servitudes may be acquired for defence purposes, if need be".

Clearly, the problem of international servitudes cannot, therefore, be treated as merely of historical political

---

<sup>56</sup> Ibid.

<sup>57</sup> Journal Officiel de la Communauté, August 15, 1960, No. 8, Annex III, pp. 74-75.

<sup>58</sup> Ibid., pp. 87-88.



interest, since they may well become the cause of future international legal proceedings. The existing theory which holds that treaties creating "servitudes" are dispositive treaties and that the rights which they create are "absolute" rights attaching permanently to the land and devolving by operation of law upon successor States would appear to require a careful re-examination in the light of the attitude and experiences of the emergent States of Asia and Africa. If "servitude", based upon the above proposition, were an accepted institution of international law, and applicable to all new subjects of that law, it would follow that States which had acquired certain rights which would be described as "real" under treaties concluded with the colonial Powers would be legally entitled to assert the continuity of such rights against the newly independent States of Asia and Africa. But seeing that international servitudes have not been conclusively endorsed by international judicial and arbitral bodies,<sup>59</sup> nor are they firmly supported by the uniform practice of

---

<sup>59</sup> Cf. The North Atlantic Coast Fisheries case, Award of September 7, 1910: Oral Argument Part II, pp. 1439-1442; A British Digest of International Law, Vol. 2b, Part III (1967) pp. 402-405; The Wimbledon case, P.C.I.J. (1923), Series A, No. 1, p. 25; The Aaland Islands case, L.N. Official Journal, Special Supplement, No. 3, October, 1920, p. 16.



States,<sup>60</sup> it may be wondered whether it is necessary to take a rigid and inflexible doctrinal approach to the effect that new States remain bound ipso jure by all "real" rights and obligations which may have been created by such treaties.<sup>61</sup> It goes without saying that the assertion of servitude rights against a new State would imply a claim on the part of a dominant State to the continued enjoyment of the prerogatives and preferential status acquired by it prior to the independence of the new State concerned. As has already been shown, matters affecting the national independence and sovereignty of the new Afro-Asian States frequently arouse great emotions. The new States' strenuous attempts in recent years to evolve 'new legal doctrines', it has been pointed out, have been inspired by the single desire to safeguard and secure their independence. Thus, time and again, in

---

<sup>60</sup> In a stimulating and provocative essay, Albert J. Esgain has, after a study of most of the treaties said to have created military servitudes, come to the conclusion that "An examination of conventional arrangements, the military rights and obligations of which are asserted to be "real" or absolute because they were alleged to have survived changes in the sovereignty of the servient State, discloses that in fact none of these arrangements survived contrary to the will of the successor State - or, in other words, devolved by operation of law". Loc. cit., n. 43 above at p. 95.

<sup>61</sup> Thus Vali says "If a right in foreign territory is the result of territorial settlement, it is nothing but just and equitable that the State which succeeds to the political boundaries of the grantor State should also be burdened by the obligations which are equally the effect of a territorial arrangement". Servitudes of International Law (1958) p. 321. See also Reid, op. cit., pp. 207-210; O'Connell, The Law of State Succession (1956) p. 63.







debates in the United Nations and other international bodies, as well as in political pronouncements at home, the new States have invoked the doctrine of national sovereignty and the inviolability of the territorial integrity of the State in defence of their newly won independence. True enough, the constant invocation by a State of the principle of sovereignty is in itself insufficient to ensure the requisite security against, say, economic subjugation or possibly military invasion from without.

Nevertheless, in the realm of theoretical discussion, the legal doctrine of sovereignty is seen by the new States to be of great defensive value. It should be added that their opposition to some of the existing rules of international law is intended precisely to make it unnecessary, in the event of a dispute with an old State, for such rules to be invoked against a new State, since, historically, it is not uncommon for a more powerful State to invoke a rule of international law alleged to have been violated by another State as a prelude to, and perhaps a justification for, an act of aggression against the alleged breaker of the rule. This would appear to be at the root of the reluctance of the new States to acknowledge the binding authority of some of the prevailing rules of international law which may some day be invoked against them. With respect to the law of State succession, the new States, having recently emerged from colonial status, become rather uneasy about legal doctrines of servitude said to create rights in favour of foreign States



permanently attaching to the land, and hence binding ipso jure upon the successor State. To determine and ascertain the reaction of the new African and Asian States to the theory of international servitudes, we shall examine some instances of the actual practice of these States with regard to those treaties concluded between the former colonial authorities and third States, which conferred rights of a territorial character upon such third States within the territory of the new States.

### 3. Practice of the New States

There are on the whole few international treaties considered as having created servitude rights affecting the territory of the new States which have been subjected to the test of succession.

#### (a) The Franco-American Agreement Respecting American Military Bases in Morocco

On December 22, 1950, the United States Ambassador in Paris, Mr. Caffery, and the French Foreign Minister, Mr. Bidault, concluded an agreement granting the United States the right to establish five military bases in Morocco. This agreement, being classified, was not published,<sup>62</sup> although it was later reported to have been concluded by France

---

<sup>62</sup> Vali, op. cit., p. 246.



pursuant to her obligation to Morocco.<sup>63</sup> It would appear, however, that Morocco never agreed to the maintenance of the bases. This becomes clear from the subsequent attitude of Morocco.

By the Treaty of Fez of March 30, 1912,<sup>64</sup> France extended her protectorate to Morocco. Article II of that treaty provided:

His Majesty the Sultan consents that henceforth the French Government, after it shall have notified the makhzen, may proceed to such military occupation of the Moroccan territory as it might deem necessary for the maintenance of good order and the security of commercial transactions, and to exercise every police supervision on land and within the Moroccan waters.

Under Article VI, France was vested with full competence for the conduct of Moroccan external relations, and the Sultan of Morocco pledged himself "not to conclude any act of an international nature without the previous approval of the French Republic".

It has been observed that it was probably under the authority of the above Articles of the Treaty of Fez that the agreement between France and the United States was concluded in 1950.<sup>65</sup> It is not clear whether or not "the makhzen" had been notified by the French Government in conformity with

---

<sup>63</sup> New York Times, May 29, 1956, Section L, p. 4.

<sup>64</sup> 6 A.J.I.L. (1912), Suppl., p. 207.

<sup>65</sup> Esgain, in The New Nations in International Law and Diplomacy (ed. by O'Brien, 1965) p. 73.





the provisions of Article II of the Treaty of Fez, but the Moroccan Government made no secret of its opposition to the establishment of the bases. Thus, when in 1956, Morocco achieved full independence, she served notice that she did not recognize the Franco-American Agreement of 1950 and that this constituted a violation of her sovereignty.<sup>66</sup>

The Joint French-Moroccan Declaration of March 2, 1956<sup>67</sup> had terminated the Treaty of Fez. This implied that the French military bases in Morocco, the establishment of which appeared to have been based upon Article II of that Treaty, had also lost the legal basis of their existence. Thus, under Article II of the Protocol annexed to the Joint Declaration, Morocco assured France that "the present status of the French Army in Morocco shall remain unchanged during the transitional period" pending the conclusion of new agreements which would define the interdependence of the two States particularly in matters of defence and foreign relations. In the Franco-Moroccan Diplomatic Accord of May 20, 1956, Morocco affirmed that she would assume "the obligations resulting from international treaties passed by France in the name of Morocco, as well as those resulting from international acts relating to Morocco which have not been subject to ob-

---

<sup>66</sup> New York Times, May 29, 1956, Section L, p. 4; Ibid., June 12, 1956, Section L, p. 13.

<sup>67</sup> 51 A.J.I.L. (1957) pp. 676-77.



servations on its part".<sup>68</sup> By a note of May 20, 1956, Morocco informed the French Government that it "completely reserves its position on whatever relates to the French-American Agreement of December 22, 1950".<sup>69</sup> The French Government in a reply of the same date assured Morocco that it had taken cognizance of her reservation and declared that "this agreement does not enter into the category of acts and treaties alluded to in Article II of the Diplomatic Agreement between France and Morocco".<sup>70</sup>

Following this, and in an effort to allay Moroccan anxiety concerning the continuation of the American bases, the United States, in November, 1957, expressed a desire to engage in fresh negotiations with the Moroccan Government with a view to settling the status of the bases on Moroccan territory, "with full respect for the sovereignty of Morocco",<sup>71</sup> and further acknowledged the continued "recognition of the United States of Moroccan sovereignty over the American bases".<sup>72</sup> As the result of subsequent negotiations,

---

<sup>68</sup> Ibid., pp. 679-81.

<sup>69</sup> Ibid., p. 682.

<sup>70</sup> Ibid., p. 683.

<sup>71</sup> Text of a joint statement by Mohammed V, King of Morocco, and the U.S. Secretary of State, John Foster Dulles, U.S. Dept. of State Bulletin, Vol. 37 (1957) p. 956.

<sup>72</sup> U.S. Dept. of State Bulletin, Vol. 41 (1959) p. 723.



the United States agreed in 1959 to withdraw all its forces from Morocco by the end of 1963.<sup>73</sup> Similarly, in March, 1961, France agreed to the withdrawal of most of its forces by October, 1961.<sup>74</sup> It is significant to note that the United States Government did not even seek any financial compensation from the Moroccan Government, in spite of the fact that the bases had been constructed at a cost of about 410 million dollars.<sup>75</sup> In view of the fact that Dr. Vali<sup>76</sup> cites the American bases agreement as an example of an international servitude, with the implication that Morocco should remain bound by it after independence, it is important to note that neither France, the United States, nor Morocco appeared to have taken the view that the Franco-American Agreement of 1950 had created a "real" right on the Moroccan territory in favour of the United States, and that Morocco was bound by operation of law to respect such a right.

(b) The Belgian Free Zone in the Ports of Dar-es-Salaam and Kigoma

At the end of the First World War, the German colony of East Africa was transformed by the victorious Powers into a

---

<sup>73</sup> Ibid., Vol. 45 (1961) p. 973.

<sup>74</sup> New York Times, October 1, 1961, Section L, p. 16.

<sup>75</sup> Ibid., May 28, 1956, Section L, p. 4.

<sup>76</sup> Vali, Servitudes of International Law (1958) pp. 246-47.





mandated territory which was then divided between Great Britain and Belgium as the mandatory Powers. The eastern portion of this territory - Tanganyika - came under British administration, and the western part of it under Belgium control. This section, called Ruanda-Urundi, was then administered as part of the Belgian Congo. During German control of this territory, Dar-es-Salaam, on the coast of Tanganyika, formed the principal port and capital city. To facilitate movement of goods and people between the eastern and western parts of the territory, the Germans constructed a railway linking Dar-es-Salaam with Kigoma on Lake Tanganyika. Both Ruanda-Urundi and the eastern part of the Belgian Congo relied upon the port of Dar-es-Salaam as their outlet to the sea. But by the division of the former German East Africa into two parts, a boundary was set up which separated Ruanda-Urundi and the eastern part of Belgian Congo from the port facilities at Dar-es-Salaam. The Belgian Government was therefore anxious to conclude an agreement with the British authorities "with a view to facilitating Belgian traffic through the territories of East Africa".

Accordingly, on March 15, 1921, a Convention<sup>77</sup> was signed in London between the United Kingdom and Belgium concerning port facilities at Kigoma and Dar-es-Salaam. This

---

<sup>77</sup> L.N.T.S., Vol. 5, pp. 319-27.



agreement contained two classes of provisions: the first dealing generally with transit across Tanganyika for goods and persons coming to and from the neighbouring territories of the Congo and Ruanda-Urundi (now Rwanda and Burundi). Under the second category, the Government of Belgium secured a lease in perpetuity at a rent of one Belgian franc per annum for sites at Dar-es-Salaam and Kigoma for the construction of port facilities.

Article 2 of the Convention reads in part as follows:

Great Britain undertakes to grant freedom of transit across East Africa by the routes which are or will be most adapted for transit, either by railway, lake, navigable water-course, or canal, to all persons, to mails, to all goods, ships, railway carriages and trucks, coming from and proceeding to the Belgian Congo, and for this purpose, passage through territorial waters will be permitted...

Article 5 provides:

With a view to facilitating the access of the Belgian Congo to the sea the British Government will lease sites in the ports of Dar-es-Salaam and Kigoma to the Belgian Government in perpetuity for an annual rent of one franc.

It should be noted, however, that under Article 6, these sites are to "remain subject to the laws and general regulations enacted by the competent British authorities and the British officials and agents shall have free access to them for the maintenance of order and the enforcement of such laws and regulations". But the sites are exempted from British customs duties. It would appear that by incorporating this provision into the Convention, the British sought to avoid a repetition of the kind of experience they



had with the Americans under the Treaty of 1818, which led to the North Atlantic Fisheries case in 1910.

New developments since the end of the Second World War made it necessary for Belgium and the United Kingdom to conclude a second agreement. This was done in London on April 6, 1951,<sup>78</sup> and under it, arrangements were made for the exchange of the site at Dar-es-Salaam, granted under the 1921 agreement, and for the provision of a new site on similar terms for the construction of a quay in the Belgian zone of the port.

The question of the continued validity and binding force on these agreements in respect of Tanganyika arose on the eve of the latter's independence in 1961. On November 30, 1961, nine days before Tanganyika acquired full independence, the then Prime Minister, Mr. Julius Nyerere, issued a policy statement<sup>79</sup> before the Tanganyika National Assembly on "what the attitude of an independent Tanganyika would be to certain treaties by which we are at present bound". While expressing the Government's anxiety that the emergence of Tanganyika as an independent State should in general cause as little disruption as possible to the relations which previously existed between foreign States

---

<sup>78</sup> U.N.T.S., Vol. 110, pp. 3-19.

<sup>79</sup> Statement by the Prime Minister of Tanganyika on State Succession, November 30, 1961, reprinted in 11 I.C.L.Q. (1962) pp. 1210-1214.





and Tanganyika, the Prime Minister declared that the Government must nevertheless remain vigilant to ensure that "where international law does not require it Tanganyika shall not in the future be bound by pre-independence commitments which are no longer compatible with their new status and interest".<sup>80</sup> Curiously enough, exception is made with respect to accepting certain treaty obligations "where international law requires it". Yet succession to treaties creating territorial or "real" rights has been asserted to be required by international law. Since the "real" or territorial character of the obligation is alleged to be the legal criterion of automatic subrogation,<sup>81</sup> the agreements of 1921 and 1951 would logically fall into this category, for the obligations they created touched and concerned land.

With particular reference to the Treaties of March 15, 1921 and of April 6, 1951, the Tanganyikan Prime Minister stated:

...the Government of Tanganyika has no objection to the continued enjoyment by all persons belonging to friendly nations, of the facilities for transit which exist between Dar-es-Salaam and the neighbouring States. Indeed, we welcome the use of our transit facilities ....We would not object to the enjoyment by foreign States of special facilities in our territory if such facilities had been granted in a manner fully compatible with our sovereign rights and our new status on

---

<sup>80</sup> Ibid., p. 1211.

<sup>81</sup> See generally, Vali, op. cit., n. 75 above; Reid, International Servitudes in Law and Practice (1932); O'Connell, State Succession, Vol. 2 (1967) p. 17 et. seq.



complete independence. But such was not the case with the facilities which were granted to Belgium under the 1921 and 1951 Agreements. A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika....<sup>82</sup>

The Prime Minister was cautious not to question the legal validity as such of the agreements as between the United Kingdom and Belgium the essence of his contention being that these could not operate to bind Tanganyika after a change of sovereignty. In this connection, he said.

We are not saying that what has hitherto been done under the 1921 and 1951 Agreements is unlawful. There is no reason for us to doubt that those agreements may have formed a satisfactory basis for relations between the United Kingdom and Belgium, but they cannot serve to bind the territory of Tanganyika permanently.... Consequently, we do not regard ourselves as bound by those two agreements.<sup>83</sup>

As indicated above, there is little doubt that these agreements themselves meet the basic specification of dispositive treaties, since they created rights that are territorially connected with the State concerned. Vali classifies them as examples of international servitudes.<sup>84</sup> If, however, the proposition is accepted that dispositive treaties creating "real" rights autonomously devolve, by operation of law, upon a successor State, then it becomes difficult to reconcile Tanganyika's post-independence legal

---

<sup>82</sup> 11 I.C.L.Q. (1962) p. 1212.

<sup>83</sup> Ibid., p. 1213.

<sup>84</sup> Vali, op. cit., pp. 140-143.



policy with this proposition. Tanganyika's attitude, as well as that of the other successor States we have considered, reveals that even treaties creating purely localized obligations may not survive contrary to the will of the successor State. To this extent, certain provisions of such treaties may still be assimilated to the category of agreements personal to the contracting parties, and hence disappearing with the disappearance of one of the parties.<sup>85</sup> The better view would, therefore, appear to be that the survival or non-survival of a treaty after change of sovereignty depends to a large extent upon: (1) the specific nature of the treaty, i.e., the nature of the rights and obligations which it creates and the effect upon the objectives of the successor State; (2) the intention of the parties. In this connection, it may not be enough merely to examine the intention of the original contracting parties; an examination of the intention of the successor State would seem equally of material relevance.

(c) The Nile Waters Agreement (1929)

Another example of an international agreement creating a localized obligation is the Nile Waters Agreement of May 7, 1929,<sup>86</sup> between the United Kingdom Government and

---

<sup>85</sup> Lester, 12 I.C.L.Q. (1963) pp. 495, 496-97; Esgain, loc. cit., p. 72.

<sup>86</sup> L.N.T.S., Vol. 93, pp. 43-121.





the Egyptian Government, with regard to the use of the waters of the River Nile for purposes of irrigation. This agreement was based on the Report of the Nile Commission of 1925, the object of which was the distribution of the Nile waters between Egypt and the Sudan to facilitate the development of the Sudan. The Report came to be considered as an integral part of the Agreement of 1929. The development of the Sudan required an increase in the quantity of the Nile water greater than that which had been hitherto utilized by it. But the consent of the Egyptian Government could only be secured on condition that such an increase did not infringe what Egypt regarded as its "natural and historical rights in the waters of the Nile and its requirements of agricultural extension".

The 1929 Agreement further provided that

Save with the previous agreement of the Egyptian Government, no irrigation or power works, or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.<sup>87</sup>

On the other hand, the Agreement conferred upon the Egyptian Government the right to construct in the Sudan any works on the Nile River or its tributaries, and to take any measures with a view to increasing the supply of the

---

<sup>87</sup> Ibid., p. 46.



water for the benefit of Egypt, subject to a prior agreement with the local authorities on the measures to be taken as a means of safeguarding local interests. The construction, maintenance and administration of such works would, however, remain under the direct control of the Egyptian Government. By accepting these conditions, the British Government did so on behalf of Sudan. The right of the Egyptian Government to construct, maintain and control "any works on the River Nile or its tributaries" amounted to a grant of "real" right in Egypt's favour, i.e., a right to carry out works in the territory of another State - the Sudan. From the point of view of State succession, this right would be held to survive change of sovereignty in favour of Egypt. Vali writes that "in view of the territorial character of the agreement, it ought to be respected by any successor State".<sup>88</sup>

However, when Sudan achieved independence in 1956, it denied the continued validity of the 1929 Agreement and insisted on its renegotiation.<sup>89</sup> On November 8, 1959, a new agreement was concluded with Egypt at Cairo, providing for additional regulation of the Nile waters on the basis of

---

<sup>88</sup> Vali, op. cit., p. 164.

<sup>89</sup> The Nile Waters Question (Ministry of Irrigation, Dept. Publication, Sudan, 1955) pp. 2-3.



existing rights.<sup>90</sup> Despite the "localized" character of the right created by the 1929 Agreement, it seems doubtful whether the agreement itself was regarded as, or even intended to be, permanent in the sense that it would automatically bind any successor State. For instance, the 1925 Nile Commission Report, which was annexed to the 1929 Agreement and regarded as an integral part of it, clearly stipulated that it was a "practical working arrangement which would respect the needs of established irrigation...(without) compromising in any way the possibilities of the more distant future".<sup>91</sup> In the House of Commons debate on May 18, 1956, the Joint Under-Secretary for Foreign Affairs stated that the British Government regarded the 1929 Agreement and other treaties creating a regime over the Nile waters as subject to renegotiation and that new agreements would be concluded on behalf of Kenya, Tanganyika and Uganda.<sup>92</sup>

The British Government also entered into a Treaty with Ethiopia on May 15, 1902<sup>93</sup> for the delimitation of the frontier between the Sudan and Ethiopia. Under this treaty, Ethiopia committed itself "not to construct, or allow to be

---

<sup>90</sup> Agreement for Utilization of the Nile Waters, Cairo, No. 8, 1959, Revue Generale de Droit Int. Public (3e ser., 1960) p. 878.

<sup>91</sup> L.N.T.S., Vol. 93, p. 58.

<sup>92</sup> 552 H.C. Debates (5th series) col. 2411.

<sup>93</sup> Hertslet, The Map of Africa by Treaty (3rd ed., 1967) p. 431.





constructed, any work across the Blue Nile, Lake Tsana, or the Sobat which would arrest the flow of their waters in the Nile except in agreement with His Britannic Majesty's Government and the Government of the Soudan".<sup>94</sup> This treaty would appear to have been intended to bind any successor State, for in the preamble the High Contracting Parties affirmed that it "shall be binding on themselves, their heirs, and successors".<sup>95</sup>

Ethiopia was conquered by Italy in 1936, and in 1938 the British Government recognized Italian sovereignty over it. But when Ethiopia regained her sovereignty, she announced that she no longer considered herself bound by the Treaty of 1902 by virtue of Britain's recognition of Italian sovereignty over Ethiopia in 1938.<sup>96</sup> No protest appears to have been made by Britain against Ethiopia's claim to be freed from the obligations of that treaty.

(d) The International Regimes of the Congo and Niger Rivers

The General Act of the Berlin Conference, signed on February 26, 1885,<sup>97</sup> aimed at the creation of international

---

<sup>94</sup> Article III of the Treaty of 1902, Ibid., p. 432.

<sup>95</sup> Ibid., p. 431.

<sup>96</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 501.

<sup>97</sup> Hertslet, The Map of Africa by Treaty, Vol. II, (3rd ed., 1967) p. 471.



regimes over the Congo and the Niger Rivers for the benefit of all nations. Article I of the Act proclaimed the principle of complete freedom of trade in all the regions forming the basin of the Congo and its outlets. Article II provided that all flags, without distinction of nationality, shall have free access to the whole of the coastline and, in particular, the right to carry on the coasting trade, even though, under customary international law, such a right has always been exclusively reserved to the littoral State in commercial treaties.<sup>98</sup> Article III provided that "wares, of whatever origin, imported into these regions, under whatever flag, by sea or river, or overland, shall be subject to no other taxes than such as may be levied as fair compensation for expenditure in the interest of trade". Article IV practically banned all import and transit duties on merchandise.

Similarly, Article XXVI declared that the River Niger and all its branches "shall remain entirely free for the merchant ships of all nations equally... for the transportation of goods and passengers". Article XXVII prohibited the imposition of import duties on merchandise, and the adoption of measures amounting to a discriminatory treatment of ships or persons of different nationalities engaged in trade on the Niger River. All the signatory

---

<sup>98</sup> Oppenheim, International Law, Vol. I (1955) p. 493.



Powers then clearly affirmed that they recognized all these provisions as forming a part of international law. This General Act was presumably intended to remain binding upon any State exercising sovereignty over the territories affected by it.<sup>99</sup>

However, on November 28, 1907, the Congo Free State (hitherto the personal possession of the King of the Belgians) was ceded by treaty to Belgium,<sup>100</sup> and on November 14, 1908, ceased to exist, having been officially annexed by Belgium. By the Treaty of Saint Germain-en-Laye of 1919,<sup>101</sup> some of the signatories of the Treaty of Berlin (notably Great Britain, Belgium, France, Italy, Japan and Portugal) abrogated inter se the General Act of Berlin and also the Act of Brussels of 1890<sup>102</sup> relative to the African slave trade, and substituted a preferential system for the system of free trade. Yet in the Oscar Chinn case,<sup>103</sup> Judge van Eysinga, was to insist, in his dissenting opinion, that the Treaty of St. Germain, 1919, could not have abro-

---

<sup>99</sup> O'Connell, State Succession, Vol. 2 (1967) p. 307.

<sup>100</sup> Hertslet, The Map of Africa by Treaty, Vol. III (3rd ed., 1967) p. 546.

<sup>101</sup> L.N.T.S., Vol. 8, p. 26; Cmd. 477; B.F.S.P., Vol. 112, p. 901.

<sup>102</sup> B.F.S.P., Vol. 82, p. 55; Hertslet's Commercial Treaties, Vol. 29, p. 116; Hertslet, The Map of Africa by Treaty, Vol. II (1967) p. 490.

<sup>103</sup> P.C.I.J. (1934), Series A/B, No. 63, p. 79.







gated the Berlin Treaty of 1885. Basing his opinion on Article 36 of the Treaty of Berlin, according to which that treaty could be abrogated or modified only by the common consent of all the signatory Powers, Judge van Eysinga said:

(The binding force of that article) resides in the fact that the States which together had established the international statute of Central Africa had made provision, as an integral part of their union, for periodical revision thereof. By doing this, the article, however, expressly provides at the same time that the Act of Berlin may only be modified with the consent of all contracting Parties, and moreover such modification would not be appropriate in the case of a convention bestowing an international statute upon a vast area. The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a jus dispositivum, but it provides the Congo Basin with a regime, a statute, a constitution. This regime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Parties is required. An inextricable legal tangle would result if, for instance, it were held that the regime of neutralization provided for in Article 11 of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others.<sup>104</sup>

It would appear that by the use of the expression "international statute", the learned judge sought to emphasize the legislative character of that international instrument, and, as a corollary, the obligation which the regime it created imposed upon the States independently of their will. But it is significant that, with regard to the basic question as to whether the Belgian Government, in according preferential treatment of a Belgian Company oper-

---

<sup>104</sup> Ibid., pp. 133-34.



ating on the Congo River, had violated the free trade provisions of the General Act of Berlin, 1885, as amended in 1919, the Permanent Court held that inasmuch as the measures taken by the Belgian Government were prompted by the grave economic crisis prevailing within its territory, "the Belgian Government was the sole judge of this critical situation and of the remedies it called for..."<sup>105</sup> The importance of this decision lies partly in the fact that, at least by implication, the Court upheld the validity of the St. Germain Treaty, 1919, abrogating the Berlin Treaty of 1885. Furthermore, this judicial decision would seem to support the principle that State measures, prima facie a legitimate exercise of governmental powers, may drastically affect foreign interests (even under a regime such as was envisaged in the Berlin General Act) if such measures are warranted by an overriding public purpose. The action of the Belgian Government itself during the period of its sovereignty over the Congo is indicative of the frequent infringements by States of the Berlin Act, the primary objective of which was the institution of a supranational economic regime of a territorial character over the Congo and the Niger Rivers.

The achievement of independence by the riparian States of the Rivers Congo and Niger has naturally raised the

---

<sup>105</sup> Ibid., p. 79.



question, in the context of the current debate on State succession, as to the present legal status of the General Act of Berlin with respect to the Congo and Niger Basins. Is the treaty to be regarded as still in force against these new States? Are these States to submit to, and indeed encourage, the laissez-faire doctrine of international trade with particular regard to the Congo and the Niger Rivers?

It should be noted that prior to the independence of the new States, all the Powers exercising sovereign rights over the various regions of the areas in question had maintained customs duty schedules.<sup>106</sup> However, the new States, preoccupied with their individual economic development problems, have adopted inconsistent attitudes towards the treaty. No doubt, the Berlin Treaty is a painful reminder of the historic injustices done to Africa by the colonial Powers. Nevertheless, some of the newly emancipated territories of the Congo region, for instance, have avoided a policy of abrupt disruption of the economic nexus established over the years by the colonial Powers. As such, they have tended to accept in the meantime the existing situation.<sup>107</sup> But, when the Cameroon, Central African Republic, Chad, Congo Brazzaville and Gabon formed a customs

---

<sup>106</sup> G.P. Verbit, "State Succession in the New Nations", Proceedings, A.S.I.L. (1966) p. 123.

<sup>107</sup> O'Connell, State Succession, Vol. 2 (1967) p. 309.







union in 1962, they announced that their accession to independence as new States had in effect abrogated the Convention of St. Germain-en-Laye of 1919.<sup>108</sup> These five States agreed to pursue a common external tariff policy. The desire of some of the ex-French African States to become associate members of the European Economic Community led to an effort on the part of the European partners to revive the obligatory force of the Berlin General Act and the Convention of St. Germain, especially as relates to the maintenance of a non-discriminatory tariff system within the territories of the African States members.<sup>109</sup> Nevertheless, Article 61 of the Yaounde Convention of 1963<sup>110</sup> made it entirely discretionary for the new States concerned to decide whether or not they regarded themselves as still bound by those treaties. Burundi, which continued to follow a non-discriminatory tariff policy, made it clear that she was doing so only for convenience.<sup>111</sup> On July 2, 1965, Rwanda introduced customs duties, according prefer-

---

<sup>108</sup> See GATT Doc. L/2061, September 13, 1963.

<sup>109</sup> This requirement is specifically embodied in Article 133(2) of the Treaty of Rome establishing the E.E.C. U.N.T.S., Vol. 298, p. 11; 51 A.J.I.L. (1957) Supplement, p. 865. See also the Yaounde Agreement of July 20, 1963, Journal Officiel de la Communauté, August 6, 1964, p. 7211.

<sup>110</sup> Ibid.

<sup>111</sup> O'Connell, loc. cit., p. 310.



ential treatment to goods from States of the European Economic Community. Congo Kinshasa, which had earlier based its commercial policy on a non-discriminatory principle, granted in 1963 a refining monopoly to the Italian State Company, Ente Nazionale Idrocarburi<sup>112</sup> - a brazen violation of the General Act of Berlin itself.

As regards the international regime of the River Niger, a conference was convened at Niamey, the Republic of Niger, in February, 1963, by seven of the nine riparian States,<sup>113</sup> who sought to conclude a new convention to replace the Treaty of Berlin of 1885 and the Saint-Germain Convention of 1919. The nine riparian States include Guinea, Mali, Ivory Coast, Upper Volta, Dahomey, Niger, Nigeria, Chad and the Cameroon. Guinea, Mali and Cameroon were unable to attend the conference. The draft text of a Convention and a statute annexed to the convention were adopted by the delegates present. This instrument envisaged the establishment of a Niger River Commission with some executive functions relating to the development of practical measures for the co-operative exploitation of the economic resources of the Niger basin. However, the general sentiment favoured the establishment of a Commission charged with purely con-

---

<sup>112</sup> The Times, London, September 27, 1963, p. 12; O'Connell, loc. cit.

<sup>113</sup> T.O. Elias, "The Berlin Treaty and the River Niger Commission", 57 A.J.I.L. (1963) p. 873.



sultative, as distinguished from executive, functions.<sup>114</sup>

With reference to the legal effect of the Convention adopted by this group of new States, Article 9 specifically provided that:

Subject to the provisions of this Convention and of the annexed Statute, the General Act of Berlin of 26 February 1885, the General Act and Declaration of Brussels of 2 July 1890, and the Convention of Saint-Germain-en-Laye of 10 September, 1919, shall be considered as abrogated in so far as they are binding between the States which are parties to the present Convention.

In so far as these new States may have been held to be bound, in virtue of State succession, by the General Act of Berlin and the Convention of St. Germain-en-Laye, the express stipulation of the provisions of Article 9 of the Niamey Convention represents unequivocal declaration of "their intention to be freed from any obligations that might still be thought to rest upon them..."<sup>115</sup> Some delegates at the Convention argued that this particular provision explicitly abrogating the Berlin and Brussels treaties was unnecessary since they had been rendered invalid by the operation of the doctrine of rebus sic stantibus from the date the riparian States achieved independence. But others took the view - and this view prevailed - that by making this express declaration they should leave no doubt as to where they stood with regard

---

<sup>114</sup> Ibid., p. 881.

<sup>115</sup> Ibid., p. 879.





to the binding effect of those treaties.

The foregoing discussion of examples of treaties creating "territorial obligations" and the attitude of successor States to such treaties discloses the prevalence of policy considerations in the inheritance of obligations created by the treaties. The pressing need for rapid economic development may provide one excuse in the case of the ex-French African colonies, for adoption of a relatively "conciliatory" attitude to "territorial obligations" imposed by international law. But, as has been shown, such attitudes, or policies, are almost always temporary. Thus, irrespective of the existence of juridical theories postulating the permanence of "localized" obligations and their automatic binding upon successor States, international practice reflects a recurrent and determined tendency on the part of successor States, including the newly independent States of Africa, to assert their freedom, as a corollary of sovereignty, to conclude or inherit whatever international treaties and agreements they consider to be in their interests.

Since, however, treaties fixing boundaries are



#### 4. Treaties Fixing Boundaries

Boundary disputes are as old as the co-existence of States. Clashes between States frequently arise from the nature or location of boundary lines. Apart from purely natural processes, it is not uncommon for an expansionist State to seek forcibly to adjust or modify to its advantage historically delimited frontiers. It is a truism that, from the point of view of national security, the possession of territory is often identified by a State with the very basis of its power. Thus, despite the enormous technological advances of today, the size of a given territory may have a decisive bearing not only upon the size of a State's population, but also the extent of its military and economic potentialities. Its significance in the game of international politics has been graphically depicted by Quincy Wright in his Study of War when he writes that:

In the rough calculations of world politics, transfer of territory has been the most important evidence of change in political power, just as in business changes in wealth have been the important evidence of changes in economic power. This is because territory with its potentialities in relation to population, taxation, resources, and strategy usually adds to military power, but even more because the value of territory has been accepted in the international mores and consequently the fact of acquisition gives evidence of power to acquire not only territory but anything else...<sup>116</sup>

Seen from another angle, "when nations feel insecure, as

---

<sup>116</sup> Quincy Wright, A Study of War, Vol. 2 (1942) p. 743 as cited by Norman Hill, Claims to Territory in International Law and Relations (1945) pp. 13-14.



most of them always do, additional land may seem to bring increased security".<sup>117</sup> It is, perhaps, for these reasons of security and enhancement of national power that Hitler asserted that "State frontiers are established by human beings and may be changed by human beings".<sup>118</sup> Thus the Second World War started as a result of the ambition of a single State to increase its national power by altering the established boundaries of European and other States. In the past, Louis XIV and Napoleon had been led by a similar desire for national grandeur and prestige to pursue expansionist policies. But, as would be expected, a country which constantly adjusts its boundaries, or forcibly expands beyond its traditional frontiers, is frequently looked upon as dangerous, and if unchecked, its propensity to expand may pose a serious threat to the security of other nations.

Despite the modern phenomenon of intensified political and economic nationalism, States share the common urge for the existence of stable and fixed territorial frontiers particularly in time of peace. The legal significance of stability and definitiveness in boundary delimitation has been recognized in international arbitral and judicial decisions relating to boundary disputes. Thus, for instance,

---

<sup>117</sup> Hill, loc. cit., p. 4.

<sup>118</sup> Hitler, Mein Kampf (Trans. by J. Murphy, 1939) p. 532.





in the Mosul case,<sup>119</sup> the Permanent Court of International Justice, in its Advisory Opinion on the interpretation of Article 3 of the Treaty of Lausanne, 1923,<sup>120</sup> relating to the fixing of the frontier between Turkey and Iraq, stated that "any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier".<sup>121</sup> The doctrine of stability of territorial frontiers was again laid down by the International Court of Justice in the case Concerning the Temple of Preah Vihear,<sup>122</sup> between Cambodia and Thailand. The Court declared:

In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the present treaty is discovered. Such a process could continue indefinitely and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.<sup>123</sup>

---

<sup>119</sup> P.C.I.J., Series B, No. 12 (1925) p. 19.

<sup>120</sup> L.N.T.S., Vol. 28, p. 11; B.T.S., 1923, No. 16; Cmd. 1929; B.F.S.P., Vol. 117, p. 543.

<sup>121</sup> P.C.I.J., Series B, No. 12, p. 20.

<sup>122</sup> I.C.J. Reports, 1962, p. 14 (Judgment of June 15, 1962).

<sup>123</sup> Ibid., p. 34.



It is this principle of stability and finality, as propounded by the International Court, which appears to underlie the conclusion of boundary treaties. As already pointed out, where a treaty establishes a frontier between the parties, the frontier agreement becomes executed upon ratification, and operates as a kind of international conveyance. A new State succeeds not to the treaty, but to the frontiers of its territory.<sup>124</sup> This is essentially different from treaty provisions that are merely executory, in which case they may not bind a successor State automatically since the force of such provisions of the treaty is not spent. On the other hand, an executed treaty "creates an objective juridical situation which continues independent of the existence of the treaty".<sup>125</sup> Thus the provisions of a boundary treaty which have been executed lose their contractual character and may be severed from the other provisions of the treaty.

The rise of the new Afro-Asian States raises the legitimate question of succession to boundary treaties. Most of the present international boundaries in Asia and Africa were fixed as a result of bilateral treaties concluded between rival colonial Powers. Their history may

---

<sup>124</sup> Jenks, in 29 B.Y.I.L. (1952) p. 107; O'Connell, The Law of State Succession (1956) p. 49; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 492.

<sup>125</sup> Lester, Ibid., p. 493.



be said to have begun with the scramble of European Powers for spheres of influence on those two continents.<sup>126</sup> Some of the boundaries demarcating the present African States were fixed when little was known of the geography, as well as the socio-cultural conditions of the African peoples. For instance, in almost every African country today there are minority groups having racial, religious or ethnic affinity with peoples of neighbouring territories. This is so because the division of the continent into spheres of power paid little regard to the actual sociological structure of the inhabitants.

In general, the new African States appear reluctant to reopen the whole boundary question. Nonetheless, in some instances, the departure of a colonial authority has led to a demand by some national governments for a re-adjustment of boundaries, and sometimes a campaign to reunify their artificially separated peoples into a new national State. Somalia provides a striking illustration of a new State whose accession to independence stimulated the pursuit of the ideal of "Greater Somalia" based upon a determination to achieve a political re-unification of its peoples. The Somali people were sub-divided during the colonial era into small political units, owing allegi-

---

<sup>126</sup> See, for example, the compilation of treaties, as title deeds, by which Africa was partitioned among the European Powers in Hertslet, The Map of Africa by Treaty, 3 Vols. (3rd ed., 1967).





ance to disparate colonial Powers with different political and legal systems. The problem of re-unification of a people living under different political sovereigns in widely detached geographic regions is in practical terms a distinct mode of acquisition of territory. And since cessions of territory are frequently a result either of war, or mere threat or use of force by the claimant State, military confrontation could not be ruled out as the possible outcome of competing territorial claims by the new States. Somalia itself reckoned in its calculation with the element of force as an indispensable instrument, failing peaceful means, for the re-unification of its peoples. It is this nationalist drive to realize the goal of a united Somali Republic that resulted in recent boundary conflicts, as will be shown, with its neighbouring States of Ethiopia and Kenya.<sup>127</sup>

Yet the demand of a new State for boundary re-alignments on the departure of a colonial authority may also be prompted by other motives, such as a re-assertion of historic titles to tracts of land adjoining the ones consolidated and recognized by the retiring administering

---

<sup>127</sup> For a detailed discussion of the causes of these conflicts, see D.J.L. Brown, "The Ethiopia-Somaliland Frontier Dispute", 5 I.C.L.Q. (1956) p. 245; "Recent Developments in the Ethiopia-Somaliland Frontier Dispute", 10 I.C.L.Q. (1961) p. 167.



Powers, or claims based strictly on prescriptive rights.<sup>128</sup> The former is illustrated by the drive of Morocco to extend its sovereignty over parts of Algeria (accompanied by military clashes in 1963), Mauritania and Spanish Sahara which she claims have always been a part of Morocco. This also accounted for the dispute between Niger and Dahomey over the Island of Lette. An example of the latter would seem to be the basis of India's claim to the Ladakh area of north-east Kashmir (regarded by China as part of Sinkiang Province) and the north-east sector around Tibet. This will be discussed in detail later on. However, there is reason to believe that as the various national governments of the new States consolidate their positions at home and begin to jostle for influence on the international plane, boundary questions may well assume greater frequency and wider significance in their relationships with neighbouring States.

The dispute between Ethiopia and Somalia which arose in 1960 involved the question of succession to a boundary treaty. Somaliland came under British protectorate in 1886.<sup>129</sup> In 1897 the treaty fixing the boundary between

---

<sup>128</sup> Rubin, "The Sino-Indian Border Disputes", 9 I.C.L.Q. (1960) p. 96; Rao, "The Sino-Indian Boundary Question and International Law", 11 I.C.L.Q. (1962) p. 375.

<sup>129</sup> B.F.S.P., Vol. 77 (1886) p. 1263; Hertslet, The Map of Africa by Treaty, Vol. 1 (1967) p. 409.



Ethiopia and Somaliland was concluded between Great Britain and Ethiopia.<sup>130</sup> This frontier cut across the traditional grazing areas of Somali tribes, the greater part of which was excluded from the British sector. It was, therefore, necessary to secure an undertaking from Ethiopia that the Somalis would be allowed to continue their annual visits to these grazing grounds. An exchange of letters to this effect was annexed to the Treaty of 1897, but the grazing rights guaranteed were not put into effect until 1954 when a new agreement was concluded between Great Britain and Ethiopia. Articles 1 and 2 of this Agreement reaffirmed the 1897 treaty, and Article 3 provided in detail for the grazing rights.<sup>131</sup> But the Agreement also acknowledged "the full and exclusive sovereignty of Ethiopia" over the grazing areas.

On June 5, Ethiopia announced that as from June 26, 1960, when British Somaliland would be independent, the grazing rights embodied in the 1954 Agreement would be regarded as "automatically invalid".<sup>132</sup> While this did not imply a denunciation of the 1897 boundary treaty, the effect of the announcement was to put the prospective Somali

---

<sup>130</sup> B.F.S.P., Vol. 89 (1897) p. 31; Hertslet, Ibid., Vol. 2, p. 423 (Treaty of May 14, 1897).

<sup>131</sup> U.K.T.S., No. 1 (1955); Cmnd. 9348.

<sup>132</sup> Brown, "Recent Developments in the Ethiopia-Somaliland Frontier Dispute", 10 I.C.L.Q. (1961) p. 169.





Republic on notice that she could not hope to succeed to rights attaching to Ethiopian territory. In response, the new Somali Government, in its first official statement, declared that the Somali Republic would not acknowledge the validity of the 1897 treaty.<sup>133</sup>

Earlier, on April 11, 1960, the British Government had announced in the House of Commons that following the termination of the responsibilities of Her Majesty's Government for the government of the Protectorate of Somaliland, the provisions of the 1897 Anglo-Ethiopian Treaty should be regarded as remaining in force between Ethiopia and the successor State. However, Article 3 of the 1954 Agreement (which comprised the grazing rights of the Somali tribes and formed the principal addition to the 1897 Treaty) would lapse upon the independence of the territory.<sup>134</sup>

Clearly, both the boundary provisions of the 1897 Treaty and the grazing rights embodied in the 1954 Agreement are a species of "territorial arrangements" or "rights in rem" since they are positively connected with land.<sup>135</sup> Ethiopia's acceptance of the validity of the boundary treaty

---

<sup>133</sup> Ibid., p. 171.

<sup>134</sup> 621 H.C. Deb. (5th ser., 1960) p. 105.

<sup>135</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 494.



(and the British Government's support of its continued binding force) may be taken to imply that Ethiopia was generally satisfied with the frontier settlement, while regarding the grazing provisions of the 1954 Agreement as independent of the treaty and therefore subject to renegotiation with the new Somali State. That is to say, the frontier delimitation could, in Ethiopia's view, survive change of sovereignty, but the 1954 Agreement could not.

The Somali view, on the other hand, might be interpreted as meaning either that she, as a new State, was under no obligation to recognize the frontiers previously settled by its predecessor with third States, or that the specific provisions of the 1897 Treaty and the 1954 Agreement remain executory and so must be re-negotiated. But, according to the principle res transit cum suo onere, rights and duties deriving from treaties relating to boundary lines, repairing of main roads, navigation on rivers, etc., not only remain valid, but they devolve ipso jure upon the successor State,<sup>136</sup> for acute international tension would prevail if State policies consistently refused to recognize the validity of such treaties.

As has already been observed, in the matter of State

---

<sup>136</sup> Oppenheim, International Law, Vol. 1 (1955) p. 159; O'Connell, The Law of State Succession (1956) pp. 50-51; Vali, op. cit., p. 21; Brown, loc. cit., pp. 172-173.



succession, not all the rights and obligations of the predecessor devolve upon the successor, except those which may be so envisaged (and boundary treaties appear to be in this class) by the contracting parties. In view of the dangerous and widespread instability which frequent territorial claims by a State could engender, it is possible to maintain that frontier provisions of a treaty are most likely to devolve automatically upon a successor State. Applied to the Somali situation, the Somali Republic is believed to have succeeded to the boundary between Ethiopia and the Protectorate of Somaliland. What it succeeds to is not so much the treaty of 1897 as the executed frontier provisions of that treaty.

The Sino-Indian border dispute provides another example of a problem involving State succession. India, which regards herself as the successor of British India, claims that the frontiers fixed and consolidated by its predecessor are its frontiers.<sup>137</sup> Part of this, in the north-east sector is the so-called "McMahon Line" which was drawn at the Simla Conference in 1914,<sup>138</sup> by the Tibetan and Chinese representatives and those of British India, the leader of

---

<sup>137</sup> Rubin, "The Sino-Indian Border Disputes", 9 I.C.L.Q. (1960) p. 96; K.K. Rao, "The Sino-Indian Boundary Question and Int. Law", 11 I.C.L.Q. (1962) p. 375.

<sup>138</sup> A. Lamb, "The China-India Border", Chatham House Essays, Vol. 2 (1964) p. 142; Rubin, loc. cit., p. 97; Rao, loc. cit., p. 390.





whom was Sir Henry McMahon. This line runs from Bhutan to the tripartite junction of the boundaries of India, Burma and China. The delimitation of the boundary was presumably based upon the principle that it should follow the watershed of the Himalayan Mountains, with minor deviations; but the boundary as such was not finally demarcated.<sup>139</sup> At this point, it should be noted that the British had clearly recognized Tibet as being under the suzerainty of China.<sup>140</sup> Thus, China came to regard this territory as remaining under its ultimate jurisdiction.

With regard to the boundary question, however, whereas India maintains that the 1914 "McMahon Line" conforms to "the traditional and customary basis of the watershed boundary",<sup>141</sup> China repudiates the Simla Agreement as void ab initio on the ground that Tibet had no authority to negotiate such agreement. The Peking Government contends that the "McMahon Line" is the product of British imperia-

---

<sup>139</sup> Sir Henry McMahon himself drew a distinction between the terms "delimitation" and "demarcation". Thus, he said:

"Delimitation I have taken to comprise the determination of a boundary line by treaty or otherwise, and its definition in written verbal terms: 'Demarcation' to comprise the actual laying down of a boundary line on the ground and its definition by boundary pillars or other similar physical means".

As cited in Rao, loc. cit., p. 376, note 2.

<sup>140</sup> Rao, loc. cit., p. 390.

<sup>141</sup> Government of India: Notes, Memoranda and Letters exchanged and Agreements signed between the Governments of India and China (White Paper III, November, 1959 - March, 1960) p. 85; Rao, loc. cit., pp. 375-76.



list policy of aggression against China's Tibet Region. The British, the argument runs, having conquered India, fanned out into adjacent territories. In this process, they encroached upon and invaded areas under the authority of Lhasa, and by virtue of this, under the ultimate authority of China. The boundary, the Chinese claim, was arbitrarily fixed and was neither recognized nor accepted by the Chinese Government.<sup>142</sup> It is these claims and counterclaims by China and India respectively, involving the Simla Treaty of 1914 that led to the massive Chinese invasion of the disputed areas on October 20, 1962. The Chinese later announced that their action was purely defensive. The dispute, however, still remains unsettled, so long as the two Governments have taken intransigent positions on the border question.

China's claims to territory in repudiation of the boundary treaties inherited by its neighbouring States are not limited to the regions of the Sino-Indian border. The Chinese Government has in recent years concluded a number of boundary treaties with such neighbouring States as

---

<sup>142</sup> See the series of White Papers published by the Government of India on this; Lamb, op. cit., p. 142.



Afghanistan, Burma, Nepal and Pakistan.<sup>143</sup> In so doing, she hopes to create the impression that failure to settle peacefully the frontier dispute with India has been in fact due to India's uncompromising attitude.

In the Sino-Burmese settlement of 1960, it was provided that the boundary would be demarcated by a joint committee "along the traditional line", except for the areas which were to be exchanged. This reference to the "traditional line" has been taken to signify an implicit acknowledgement by China perhaps of the existing boundary lines, which may include even the disputed "McMahon Line".<sup>144</sup> It may be added that the Peking Government's broad challenge of the legal validity of the boundaries fixed by the colonial Powers and succeeded to by its neighbouring States is not inconsistent with its revolutionary political philosophy which sees "imperialism" and all its legacies as

---

<sup>143</sup> Sino-Burmese Agreement, January 28, 1960 (Keesing's Contemporary Archives, 1959-60, p. 17278D); China-Nepal Border Agreement, March 21, 1960 (Ibid., p. 17380A), ratified in April, 1960 (Ibid., 17732); China-Mongolia Agreement of December 26, 1962 (Ibid., 1963-64, p. 19203 D); Pakistan-Chinese provisional Agreement on delimitation and demarcation of frontier (sic) between Pakistan controlled Kashmir and Sinkiang, December 26, 1962, with Indian Protests (Ibid., 1963-64, p. 19208A); Final Agreement between the two countries, March 2, 1963 (Ibid., p. 19427); Sino-Afghanistan Agreement of November 24, 1963 (Ibid., p. 19761).

<sup>144</sup> Keesing's Contemporary Archives, 1959-60, p. 17278.







"the most diabolical enemy of the peoples of the world"<sup>145</sup> that must be completely liquidated. Thus, to China, the principles of international law, not to speak of the law of State succession, are totally inapplicable to the settlement of such vital political issues as those impinging upon the all-important matter of a State's sovereignty over territory. Interestingly enough, India, itself a leading champion of the new States' movement to promote "new norms of international law", who by no means condones colonialism, finds it expedient to rely firmly upon traditional rules of international law relating to "acquisition or inheritance of territorial rights" as a means of sustaining her claim to the disputed territory vis-a-vis China.<sup>146</sup>

The case concerning the Temple of Preah Vihear<sup>147</sup> originated in a dispute between Cambodia and Thailand regarding the boundary settlements of 1904-1907 between France and Siam (now Thailand). The dispute concerned the control of the area of land where the Temple of Preah Vihear was located. The boundary running through the area separating Cambodia from Thailand was delimited by the Treaty

---

<sup>145</sup> The World Today, Vol. 17, No. 2 (1961) p. 68 at p. 72.

<sup>146</sup> See the Exchange of Notes and Letters between the two Governments, White Papers, Nos. 1-4, published by the Indian Ministry of External Affairs, 1959-61. The article by K. Krishna Rao, Legal Adviser to the Indian Ministry of External Affairs, on the "Sino-Indian Boundary Question" pretty well spells out the legal rationale of India's position. 11 I.C.L.Q. (1962) p. 375.

<sup>147</sup> I.C.J. Reports, 1962, p. 14.



of February 13, 1904, as amended by a second Treaty of March 23, 1907.<sup>148</sup> These treaties made no express mention of the Temple area, but a Franco-Siamese Mixed Commission was set up to demarcate the frontier. It does not appear that the Commission was able to fulfil its objective before it was finally disbanded.

The International Court was, therefore, to decide what boundary line, if any, had been fixed by the Commission, and failing that, to determine where the frontier between the two countries should lie. Cambodia based its claim on the Franco-Siamese Treaty of 1904, arguing that that treaty continued in force as between Cambodia and Thailand, for all relevant treaties concluded by France had been concluded on behalf of Cambodia inasmuch as the latter was a Protectorate of France. Cambodia expressly stated that she was not basing her position on grounds of State succession, but rather on the fact that the continued validity of applicable treaties could not be affected by the termination of French protection. Thailand, on the other hand, contended that, even if it were admitted that treaties can devolve upon successor States only by virtue of devolution agreements, such agreements were in fact res inter alios acta and cannot bind third States without their consent; in any event, a State cannot succeed to the politi-

---

<sup>148</sup> Ibid., pp. 16-17.



cal provisions of a treaty, otherwise a bilateral treaty would be transformed into a "multilateral pacific settlement treaty".<sup>149</sup>

The majority of the Court ruled in support of Cambodia's claim. Taking particular cognizance of the preamble to the Treaty of 1904 which spoke of the Parties being desirous "of ensuring the final regulation of all questions relating to the common frontiers of Indo-China and Siam",<sup>150</sup> the Court interpreted this as expressing an intention to settle once and for all the border question which had been responsible for the "uncertainty, trouble and friction"<sup>151</sup> in the relations between the two countries. Boundary settlements require a high degree of certainty and stability, for, as was stated by the International Court of Justice, "when two countries establish a frontier between them, one of the primary objects to to achieve stability and finality".<sup>152</sup> The common awareness of States that without the clear delimitation of frontiers the sovereign authority in a disputed territory becomes difficult to ascertain, coupled with their inherent desire for security,

---

<sup>149</sup> See Preliminary Objections, I.C.J. Reports, 1961, pp. 15-28.

<sup>150</sup> I.C.J. Reports, 1962, p. 35.

<sup>151</sup> Ibid., p. 34.

<sup>152</sup> Ibid.





lends considerable importance and practical utility to this general principle.

The Court's decision in the above case amounted to saying that both Cambodia and Thailand continued to be bound by the Franco-Siamese Treaty of 1904 which delimited the boundary between Cambodia and Siam (Thailand). But in so deciding, the Court stopped short of declaring whether Cambodia was a successor to all relevant treaties concluded by France in virtue of the Protectorate, or whether she succeeded merely to the boundary treaties as "dispositive" treaties creating "rights in rem". To this extent, this important question of doctrine was again left judicially unsettled. Nonetheless, it is possible to argue that the Court's emphasis on the general rule of "stability and finality" as the basic objective of boundary treaties was equivalent to pronouncing upon the executed character of the frontier provisions of duly ratified boundary treaties in general, which rendered them binding upon successor States. But it seems important to stress also that the actual judicial interpretation<sup>153</sup> of the pertinent provisions

---

<sup>153</sup> Although the fundamental rule of treaty interpretation calls for the maintenance of the integrity of the treaty as a means of ascertaining the intentions of the parties (Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 B.Y.I.L. (1949) p. 76), the separability of "self-contained" provisions of a treaty from other provisions of the same treaty would seem admissible in judicial practice. See, e.g., Agricultural Labour and Production case (1922), P.C.I.J., Series B, Nos. 2/3, pp. 23-25; Statute of the Memel Territory case (1932) P.C.I.J., Series A/B, No. 49, p. 312.



of a given boundary treaty may well be the decisive factor in determining whether such provisions remain in force and unaffected by change of sovereignty, or whether the existing state of facts calls for a modification of the previous settlement.

The Moroccan-Algerian armed conflict of October, 1963<sup>154</sup> resulted from disagreement over the frontier between the two countries, purported to have been delimited by the Franco-Moroccan Treaties of 1845<sup>155</sup> and 1912.<sup>156</sup> The signing of these treaties followed the French conquest of Algeria in 1830.<sup>157</sup> Article III of the 1845 Treaty defined the frontier between Morocco and Algeria from the coast as far south as Teniel-el-Sassi. With reference to the Sahara desert region, Article IV provided that "there is no territorial limit to be established between the two countries, since the land cannot be tilled, and can only be used as pasture ground for the Arabs of the two empires (the French and the Moroccan empires)". Article VI stipulated that with regard to the southern sector of the

---

<sup>154</sup> The Times, London, October 31, 1963, p. 9; Ibid., November 8, 1963, p. 13; West Africa, No. 2422, November 2, 1963, p. 1235; Ibid., No. 2423, November 11, 1963, p. 1263.

<sup>155</sup> B.F.S.P., Vol. 34, p. 1287; Hertslet, The Map of Africa by Treaty, Vol. 3 (1967) p. 1146.

<sup>156</sup> B.F.S.P., Vol. 101, pp. 428-30.

<sup>157</sup> Hertslet, op. cit., Vol. 2 (1967) p. 643.



territory, since it "is uninhabitable", any delimitation of it would be superfluous. However, the various cattle-herding groups who were to be permitted to use the grazing grounds were fully enumerated under Article IV, and these included nomadic groups from both the Moroccan and the French zones of the area.

When, however, Morocco came under French control in 1912, it became necessary to delimit the boundary to the south to allay Algerian fears. In that process, units of settlers in the area, who historically had owed spiritual allegiance to the King of Morocco, were arbitrarily split into two, part of which was then brought under French Algerian authority.

With the attainment of Moroccan independence in 1956, there emerged a nationalist sentiment aimed at recovering the Moroccan territory alleged to have been cut off by the French. The campaign gained momentum as the years went by. Thus, when in 1962 Algeria became independent, the Moroccan Government advanced its claim to the disputed territory, asserting that it legitimately belonged under Moroccan sovereignty.<sup>158</sup> The Algerian Government was not prepared, after one of the most bloody revolutions in history to acquire self-determination, to cede any part of its territory to another claimant State. The fighting that broke

---

<sup>158</sup> The Times, London, November 8, 1963, p. 13; New York Times, November 8, 1963, Section L, p. 4.







out between the two States spread over the south-west border and along the boundary northwards, particularly along two oasis posts controlling the route to the iron-ore town of Tindouf.<sup>159</sup> A cease-fire arranged under the auspices of the Organization of African Unity came into force on October 30, 1963. Under the cease-fire agreement, it was decided that a military commission composed of Algerian, Moroccan, Mali and Ethiopian Officers would delimit a neutral zone along the disputed boundary. Meanwhile, O.A.U. Foreign Ministers were empowered to meet and appoint a special arbitration commission to study the frontier problem and recommend measures for settlement. However, before the O.A.U. efforts came to fruition, Algeria and Morocco announced on February 2, 1964, that they had reached a mutual agreement on the peaceful settlement of their boundary dispute.<sup>160</sup>

The Moroccan-Algerian border conflict provides another significant evidence of the possibility of a successor State questioning the propriety and validity of a treaty creating locally connected rights. It further demonstrates that at times the successor States concerned prefer either a direct re-negotiation of a disputed frontier arrangement, or the more flexible diplomatic and mediatory procedures,

---

<sup>159</sup> The Times, London, October 31, 1963, pp. 9, 12.

<sup>160</sup> The Times, London, February 21, 1964, p. 12; Guardian, February 21, 1964, p. 13.



as distinguished from reliance upon stringent legal formulae, for settling inherited boundary problems.

With the above analysis of doctrine, judicial precedent and State practice relating to "dispositive" treaties, we are presented with an overall picture of extreme complexity, ambivalence and even confusion. While some jurists maintain that dispositive treaties creating "localized" obligations survive changes of sovereignty and are binding upon successor States,<sup>161</sup> others insist that treaties which burden the territory of a State are nothing more than normal treaty relations between States which are personal in character and are regulated by precisely the same rules that are applicable to international treaties in general.<sup>162</sup> It is further argued that the acceptance of an exclusive class of "localized" treaties as devolving automatically upon successor States is little supported by the practice of States, and would be grossly inconsistent

---

<sup>161</sup> Vali, Servitudes of International Law (1958) p. 321; Oppenheim, International Law, Vol. 1 (1955) p. 159; O'Connell, The Law of State Succession (1956) p. 63; de Visscher, Theory and Reality in Public International Law (rev. ed., 1968) p. 179; Kelsen, Principles of International Law (1952) p. 417.

<sup>162</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 475; A.J. Esgain, "Military Servitudes and the New Nations", in O'Brien (ed.) The New Nations in International Law and Diplomacy (1965) p. 42; Keith, The Theory of State Succession (1907) p. 22; G. Crusen "Les Servitudes internationales", 22 Hague Recueil (1928) p. 31.



with the basic interests in their relations inter se.<sup>163</sup>

In judicial practice, a great deal of caution is exercised, so that decisions or arbitral opinions refrain from statements confirmatory of orthodox doctrines of international servitudes. Rather, a given case tends to be treated with a close reference to the specific facts of its context. Thus, the international commission of jurists appointed by the Council of the League of Nations to determine the legal issues involved in the Aaland Islands case, based its position on the concept of "the general interest of Europe" in holding that the demilitarization regime created by the Treaty of 1856 remained binding upon Finland or any other State exercising sovereignty over the Islands.<sup>164</sup> Again, the Hague Tribunal in the North Atlantic Fisheries case (1910)<sup>165</sup> denied arbitral validation to the doctrine of international servitude advanced by the United States. Similarly, in the Wimbledon case, the Permanent Court, though providing, by its decision, evidence of judicial toleration of the existence of special regimes of a conventional origin imposing certain limitations upon

---

<sup>163</sup> See Robert Delsen, "Comments on State Succession", Proceedings, A.S.I.L. (1966) p. 111; G.P. Verbit, "State Succession in the New Nations", Ibid., p. 119.

<sup>164</sup> L.N., Official Journal, Special Suppl., No. 3, 1920, p. 16.

<sup>165</sup> Supra note 59.







the sovereignty of the servient State, declared that it was "not called upon to take a definite attitude" with regard to the question of international servitudes.<sup>166</sup> The practice of States, governed as it is by the amorphous maxims of policy, shows no well-defined position and offers little or no comfort to doctrine itself. The precise question here is not so much the imposition of restrictions upon State sovereignty per se, since in customary international law, besides that stemming from unambiguous international contracts, the practice is not entirely unknown. Indeed there is a wide range of restrictions on State sovereignty, under international law, which are accepted in theory and practice. Some of these include the right of innocent passage through territorial waters, rules relating to international commerce and traffic, principles affecting nationality, and the general obligation upon a State to refrain from using its territory as a source of economic harm or political injury to other States. Strictly speaking, the principle of "individual or collective self-defence", in so far as it allows the use of force against or within the territory of other States, may be construed as a limitation upon State sovereignty. But because these are generally viewed as part and parcel of general international law, their legal effects



upon the doctrine of State sovereignty are often taken for granted. However, where the specific theoretical question of the existence of a general rule of international law sanctioning the system of international servitudes or of "localized" obligations, without regard to the nature or source of such obligations, is involved, the problem takes on a different character. It is the dangerous implications of this theory, involving one State's territory being permanently burdened with obligations in favour of another State of group of States, which evoke a suspicious reaction from States, who are traditionally jealous of their sovereignty.

In the light of this general tendency, it may, therefore, be submitted that neither the theories put forward by jurists nor available judicial precedents have succeeded in explaining satisfactorily the reasons for the wide divergence which exists between the prevailing doctrines of "localized" obligations and the practice of States relative to inheriting such obligations. Perhaps there is more wisdom in Sir Gerald Fitzmaurice's observation that:

What has to be considered in all such cases is not merely whether certain obligations relate or are locally connected with the... territory, but whether they are of such nature, and intended to be effective universally or quasi-universally, as to impress the territory or something in it with a character henceforth inherent in the territory, and irrespective of whether any personal obligation in the matter has been



assumed by the local sovereign. 167

Although the practice of the new States, as revealed in this study, would appear to lean towards a negative view of the doctrine of automatic succession to "dispositive" treaties, it is possible to argue that this is largely a result of a multiplicity of factors, including the psychological revision engendered by the notion of subjecting their territories again, after centuries of colonial domination, to the permanent service of the interests of foreign States. But certainly it is also a function of the interpretation placed by a given State upon specific treaty provisions relating to its territory. It would appear, however, that the approach of States to the whole problem of succession to "dispositive" obligations is sufficiently flexible. This very flexibility may well account for the unavoidable inconsistencies in their practice and the resulting disregard of existing international law doctrines of "dispositive" or "localized" treaties.





## CHAPTER VII

### SUCCESSION TO BILATERAL TREATIES AND

#### ECONOMIC CONCESSIONS

##### 1. General

It is a settled principle of international law that valid international treaties are binding only upon the contracting parties.<sup>1</sup> This principle finds expression in the general rule that pacta tertiis nec nocent nec prosunt, hence treaties are res inter alios acta so far as third States are concerned.<sup>2</sup> The underlying reason for this general rule appears to be that a treaty is essentially a contract; it therefore attaches strictly, unless otherwise provided in the treaty itself, to the person of the contracting parties and can only be performed personally. "(T)he radius of operation of treaties may be extended (only) by recognition or acquiescence on the part of other subjects of

---

<sup>1</sup> Harvard Research in International Law: Law of Treaties (1935) Article 18, 29 A.J.I.L., Sp. Supplement (1935); Oppenheim, International Law, Vol. I (1955) pp. 894, 925; McNair, The Law of Treaties (1961) p. 309.

<sup>2</sup> De Muralt, The Problem of State Succession with Regard to Treaties (1954) p. 40; Castren, "Obligations of States arising from the Dismemberment of another State", 13 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (1951) pp. 753-54; see also U.N. Doc. A/CN.4/160, Annex II, pp. 2-3 (June 7, 1963); Keith, Theory of State Succession (1907) p. 20.



5 See, e.g., Cavaglier, "Regles generales du droit de la national Law (1965) pp. 516-18; O'Connell, The Law of State Succession (1956) pp. 15-16.

The Kellogg-Briand Pact (1928) and the provisions of Article 2(6) of the United Nations Charter stipulating that "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security" must be seen as an exception rather than the rule. It is an attempt by the world community to create through a treaty a universal international law, binding on all States, for the purpose of limiting the use of force as an instrument of national policy. See generally, C.W. Jenks, The Common Law of Man-kind (1958) p. 92.

4 R.V. Jennings, "The Progressive Development of International Law and Its Codification", 24 B.Y.I.L. (1947) p. 304; O'Connell, State Succession, Vol. 2, (1967) pp. 212-213; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 475.

3 Schwarzenberger, International Law, Vol. 1 (1957) pp. 176, 446.

international law".<sup>3</sup> If, however, a treaty is merely declaratory of existing rules of customary international law, then third States will be bound by those rules. But the rules derive their binding force not necessarily from the treaty itself, but from customary international law.<sup>4</sup> It has been stated that a treaty, whether political, economic, technical or judicial, is, properly speaking, a matter of political arrangement and convenience for the signatories.<sup>5</sup> Consequently, from the point of view of State succession, its continued validity depends upon the continued existence of the contracting parties. According



to Marek, "territorial changes and internal revolutions in no way affect the identity and continuity of States".<sup>6</sup> This implies that the treaty rights and obligations of a State under international law, in the event of territorial changes, remain attached to the person of that State, provided its international personality remains substantially unimpaired.<sup>7</sup> Article 6 of the 1959 draft code on the Law of Treaties, prepared by the International Law Commission of the United Nations declared, inter alia, that "the rights and obligations provided for in the treaty attach to the parties to it as States, irrespective of the particular form or method of its conclusion".<sup>8</sup> In so far as the effect of change of sovereignty on international agreements is concerned, the Commission maintained that a "diminution in the assets of the State, or territorial changes affecting the extent of the area of the State by loss or transfer of territory (but not affecting its existence or identity as a State)", may occur without affecting the international validity of the

---

<sup>6</sup> Marek, Identity and Continuity of States in Public International Law (1968) p. 15.

<sup>7</sup> Ibid., p. 24; W.E. Hall, A Treatise on International Law (8th ed., 1924) p. 114; Hershey, "The Succession of States", 5 A.J.I.L. (1911) p. 285; McNair, The Law of Treaties (1961) p. 601; C.C. Hyde, International Law, Vol. 2 (2nd rev. ed., 1947) p. 1536.

<sup>8</sup> Yearbook of the International Law Commission, Vol. 2 (1959) p. 43.







treaty obligations, "unless the treaty itself specifically relates to the particular assets or territory concerned".<sup>9</sup> However, Article 69 of the final Draft Articles on the Law of Treaties adopted by the United Nations Committee of the Whole in 1968, having regard to the fact that the draft code on Succession of States to Treaties is still to be submitted by the State Succession Sub-Committee of the International Law Commission, merely stipulates that "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States".<sup>10</sup>

From the foregoing, it is clear that the concept of international personality has been regarded as the basic criterion for determining the transmissibility or non-transmissibility of treaty rights and duties with respect to changes in sovereignty over territory, except, perhaps, in the rare cases of general "law-making" treaties. But it must be borne in mind that at the height of the theoretical controversy in the nineteenth century over the problem of subrogation to treaty rights and obligations, the commonest form of State succession was annexation or cession of territory. Thus the rules developed through State practice were inevitably influenced by the peculiar nature of the problem

---

<sup>9</sup> Ibid.

<sup>10</sup> Doc. A/CONF.39/C.1/L.370/Add.7.



during that period. It is true that occasionally a new State came into existence as a result either of the dismemberment of an old State or of secession by peaceful or revolutionary means. In either case, the problem was still one of State succession. The emergence of Czechoslovakia in 1919 as a consequence of the break up of Austria-Hungary, and the secession of Belgium from Holland in 1830 and of Finland from Russia in 1919 are cases in point. In all this, the notion of international personality played a key role in the decision whether the new State was to be completely subrogated in the treaty rights of its predecessor, or to start life with "a clean slate". But as regards bilateral treaties, while bearing in mind the principle that there is no automatic devolution of treaties except with the express or tacit consent of the succeeding State, the solution found to specific succession problems depended largely upon the concrete circumstances. A new State remained free, as a sovereign State, to decide whether or not to succeed to the treaty obligations of its predecessor. Quite often, such a decision was influenced by the desire for an accommodation of interests, based upon the purposes of specific treaties and the essential interests of the new State.

Since the end of the Second World War, the process of decolonization has led to the large scale grant of independence to the former colonial countries in Asia and Africa. This has raised the question of re-examination of the typo-



logy of State succession based upon a study of the material basis of the changes which may have occurred in the legal principles relating to State succession.<sup>11</sup> Some authorities,<sup>12</sup> convinced that the sudden rise of new States as a result of decolonization represents unquestionably a new type of State succession which raises novel doctrinal problems, have called for a reformulation of the theory of State succession to take account of the sociological needs of the contemporary international society. Professor O'Connell proposes the elimination of the "artificial distinction" between personal treaties and dispositive treaties, and that between succession of States and succession of Governments in order to permit the development of a logically consistent theory of State succession providing for automatic (universal) succession to treaties.<sup>13</sup> Kenneth Keith discerns in the existing pattern of practice by the new States with specific reference to bilateral treaties the existence of an opinio juris providing evidence of "a general

---

<sup>11</sup> This has been one of the aims of the International Law Commission Sub-Committee on State Succession in its effort to develop new rules of State succession. See its report in GAOR, 23rd sess., Suppl. No. 9 (A/7209/Rev. 1); 8 Int. Legal Materials (1969) p. 168.

<sup>12</sup> O'Connell, "Independence and Problems of State Succession", in The New Nations in Int. Law and Diplomacy (1965) p. 7; Keith, "Succession to Bilateral Treaties...", 61 A.J.I.L. (1967) p. 521.

<sup>13</sup> O'Connell, loc. cit. n. 12 above, p. 25.





rule of law requiring succession".<sup>14</sup>

Similarly, Professor La Forest<sup>15</sup> agrees with O'Connell that "the traditional dichotomy of change of state and change of government may be of limited value under current world conditions, and should be discarded".<sup>16</sup> He argues that in attempting to reformulate the law regarding political change, one should not begin within the confines of established legal categories. Assessing the problem from the stand point of the policy-makers, he maintains that the new approach to the law of State succession, rather than look to the past which was characterized by a different "power and economic structure of the world community", should be oriented towards the future. Thus he believes that contemporary social forces not only generate "the common desire for productive stability in the affairs of people", but also "favour the honouring of existing obligations, irrespective of changes of governmental elites and structures or boundaries".<sup>17</sup> These "broad policies", he suggests, are designed to secure "the goal of minimum world order" and

---

<sup>14</sup> Kenneth J. Keith, loc. cit., 61 A.J.I.L. (1967) p. 521 at p. 541, note 81 and p. 545.

<sup>15</sup> Gerard V. La Forest, "Towards a Reformulation of the Law of State Succession", Proceedings, A.S.I.L. (April, 1966) p. 103.

<sup>16</sup> Ibid., p. 104.

<sup>17</sup> Ibid., p. 105.



encourage "the freest possible flow of wealth, skills and people across state lines".<sup>18</sup>

This theoretical position is not shared in its entirety by most writers on international law. Professor Verbit,<sup>19</sup> for instance, contends that the postulation of a theory of general succession is impractical and unrealistic since it could not be reasonably expected that treaties of commerce, of extradition, and judicial treaties should devolve automatically upon a new State without its consent. Dr. Karl Zemanek,<sup>20</sup> in his Hague lectures on "State Succession after Decolonisation", questions the soundness of the "new" theory not merely because it is in the nature of proposals de lege ferenda, but also because relevant contemporary international practice could hardly afford proof of the existence of a norm of customary international law supporting general succession. As he has stated, "there is no evidence that the maxim pacta tertiis nec nocent nec prosunt has become obsolete in international law or is inapplicable in the pre-

---

<sup>18</sup> Ibid.

<sup>19</sup> G.P. Verbit, "State Succession in the New Nations", Proceedings, A.S.I.L. (1966) p. 119.

<sup>20</sup> Karl Zemanek in 116 Hague Recueil (1965 III) p. 187.



sent context".<sup>21</sup> Hence, even a devolution agreement cannot operate to impose obligations on third States, nor confer rights upon them. Despite the desirability of continuity of treaty obligations, States must still retain the right of option.

In his earlier work, Professor O'Connell aptly observed that "the effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation".<sup>22</sup> This would seem to imply that for a treaty to survive a change of sovereignty not only must it have been so intended by the contracting parties, but its objective, upon interpretation, must reasonably conform to the changed circumstances. As has been shown earlier,<sup>23</sup> the new States do in general succeed to multilateral treaties of a technical, administrative and humanitarian character. This would appear to derive from their recognition of the element of common interests in these treaties, and also from

---

<sup>21</sup> Ibid., p. 215.

Cf. Professor Bartos working paper for the I.L.C., U.N. Doc. A/CN.4/160, Annex II, Appendix, p. 15; Erik Castren of the I.L.C. says, "Where international succession is understood to signify some kind of a general transfer of rights and duties between international persons regardless of their will, a firm stand must be taken against it". Ibid., p. 3.

<sup>22</sup> O'Connell, The Law of State Succession (1956) p. 15.

<sup>23</sup> Supra Ch. IV.





the compelling necessity of continuity from the point of view of the world community at large.<sup>24</sup> But even so, their practice can hardly be said to be so consistent, since in many instances they have been known to reject otherwise innocuous treaties,<sup>25</sup> as to suggest the existence of a general rule of law supporting automatic succession. In so far as bilateral treaties are concerned, the new States have been far more circumspect in admitting succession regardless of whether or not they had concluded inheritance agreements with their predecessors.

## 2. Historical Precedents and Succession to Bilateral Treaties

To be able to evaluate the practice of the new Afro-Asian States in the light of contemporary developments, it seems relevant to examine past cases of emergence of States into independence and their attitude towards the treaty obligations of their predecessors.

One of the earliest instances of the birth of a new State by secession was the declaration by the United States in 1776 of independence from Great Britain. But the United States did not consider itself bound by previous British treaties affecting its territory, nor did Great Britain

---

<sup>24</sup> Verbit, loc. cit. n. 19 above at p. 121.

<sup>25</sup> Cf. Morocco's refusal to acknowledge succession to the Convention on the Privileges and Immunities of the United Nations. See I.L.C. Yearbook, Vol. II, 1962, p. 111.



appear to have regarded it as bound by any such treaties.<sup>26</sup> After seceding in 1903 from Colombia, Panama was requested by the United States to extradite a fugitive. Although Panama agreed to the American request, she maintained that the extradition was purely an act of comity, adding in a note to the American Government that "at the present time there exists no extradition treaty between the United States and Panama".<sup>27</sup> The Panamanian attitude was later confirmed when in a legal opinion of March 6, 1908, the State Department declared that a consular convention of 1850 with Colombia was not binding on Panama.<sup>28</sup> Similarly, the British Government adopted the view that Panama was a new State and was no longer obliged by the extradition and commercial treaties which then existed between Great Britain and Colombia.<sup>29</sup> When Finland declared her independence in 1919, the view of the British Government was that in the case of a new State created out of an old State, there is no succession by the new State to the treaties of the old one, hence Finland was considered as not bound by the then existing

---

<sup>26</sup> McNair, Law of Treaties (1961) p. 601; O'Connell, The Law of State Succession (1956) p. 34.

<sup>27</sup> Hackworth, Digest of Int. Law, Vol. 5, p. 363; O'Connell, Ibid., p. 35.

<sup>28</sup> Hackworth, Ibid.

<sup>29</sup> McNair, loc. cit., p. 605.



treaties between Great Britain and Russia.<sup>30</sup> A new extradition treaty was concluded between Britain and Finland in 1924;<sup>31</sup> the United States similarly concluded a new extradition treaty with Finland.<sup>32</sup>

In 1830, Belgium broke from Holland and formed a new State. By the Treaty of November 15, 1831, her independence was recognized by France, Great Britain, Prussia, Austria and Russia.<sup>33</sup> With regard to the treaty obligations of Holland, Belgium was believed to start life unencumbered, except in so far as applicable treaties were of a localized or dispositive character.<sup>34</sup> Thus, in a note of August 22, 1831, the British Government informed the Belgian Government that the obligations imposed on Holland by the Treaty of Vienna, 1815, regarding the maintenance of fortresses on the Franco-Belgian frontier continued in force with res-

---

<sup>30</sup> Ibid.; O'Connell, loc. cit., p. 36.

In his later work, Professor O'Connell argues that since the secession of Finland from Russia did not involve a complete disruption of legal continuity, the British Government was probably misled into adopting the above policy by failure to analyse the constitutional position of treaties in Finnish law. (State Succession, Vol. 2 (1967) p. 99).

<sup>31</sup> B.F.S.P., Vol. 119, p. 343; Cmd. 2417.

<sup>32</sup> L.N.T.S., Vol. 34, p. 103; U.S.T.S., No. 710.

<sup>33</sup> McNair, loc. cit., p. 603.

<sup>34</sup> Ibid.





pect to the new State of Belgium.<sup>35</sup> The birth of Czechoslovakia as a result of the dismemberment of the Austro-Hungarian empire at the end of the First World War automatically raised the question of its succession to the treaty obligations of Austro-Hungary. While Austria and Hungary were considered to continue to be bound by the treaties of the Austro-Hungarian Monarchy,<sup>36</sup> Czechoslovakia did not appear to have been regarded as a partial successor of the Austro-Hungarian empire,<sup>37</sup> for the latter's treaties were not held to have devolved upon the former. When the United States negotiated a new extradition treaty with Czechoslovakia in 1925, it did so apparently on the assumption that Czechoslovakia was not obliged by the treaty commitments of the Austro-Hungarian empire.<sup>38</sup> Furthermore, in the extradition case between Germany and Czechoslovakia,<sup>39</sup> a German court held that the latter was not automatically bound by the extradition treaty which existed between Austria

---

<sup>35</sup> O'Connell, The Law of State Succession (1956) p. 57; McNair, op. cit., p. 603.

<sup>36</sup> O'Connell, State Succession, Vol. 2 (1967) p. 178.

<sup>37</sup> McNair, op. cit., p. 604.

<sup>38</sup> Foreign Relations of the United States, Vol. 2 (1925) pp. 32-33.

<sup>39</sup> Annual Digest, 1919-1922, Case No. 182.



and Germany. Under the terms of the Peace Treaty of 1919,<sup>40</sup> by which the Principal Allied and Associated Powers recognized the sovereign independence of Czechoslovakia, the latter committed itself to adhere within twelve months to a number of international conventions of an economic character, and was given the option of deciding whether or not to adhere to two other economic conventions.<sup>41</sup> Commenting on the negative attitude adopted by other States towards Czechoslovakia's succession to the treaties of Austro-Hungary, Professor O'Connell suggests that this was prompted by Czechoslovakia's negative attitude. He states:

Many of the treaties in question were reciprocal in character, and when the Czech courts refused to apply them, foreign courts retaliated in kind. It is clear from the various judgments that, had the Czech courts taken a positive attitude, the foreign courts could have reciprocated. It was pointed out at the time that the Czech policy was not entirely to Czechoslovakia's advantage, and that therefore it was not as politically defensible as might at first appear.<sup>42</sup>

The importance of the above statement lies, it would seem, in the fact that in the judicial determination of the applicability of treaties assumed to have devolved upon a successor State, a national court might find it difficult entirely to

---

<sup>40</sup> Treaty of St. Germain of 10 September, 1919, B.T.S., 1919, No. 17; Cmd. 400; B.F.S.P., Vol. 112, p. 514; L.N.T.S., Vol. 8, p. 27.

<sup>41</sup> McNair, op. cit., pp. 604-605.

<sup>42</sup> O'Connell, State Succession, Vol. II (1967) p. 180.



divorce itself from the political sentiments with which the legislative and executive organs of the State are associated. Although the above cases are necessarily selective, they serve to illustrate the general practice of States relating to the inheritance of bilateral treaties.

### 3. Practice of the New States and Judicial Decisions

Unlike their practice regarding succession to multilateral treaties where the general tendency is affirmative, the new States' attitude towards bilateral treaties is grossly lacking in uniformity, and generally marked by excessive caution. The result is the astonishing paucity of available material relating to their practice in respect to this category of treaties. This is more so when it is realized that the vast majority of the treaties of the predecessor States which were applied within the territory of these new States are of the class of bilateral agreements. A number of reasons have been suggested for the present state of affairs. Unlike multilateral treaties which are under the supervision and protection of a comparatively small number of depositaries, bilateral treaties lack the blessing of the co-ordinating and centralizing influence of such depositaries.<sup>43</sup> Thus, one source of difficulty relating to bilateral treaties appears to be the multiplicity of their

---

<sup>43</sup> Zemanek, "State Succession after Decolonisation", 116 Hague Recueil (1965) p. 235.





depositories, compounded by the divergent practices of the respective States. This diversity of practice, it has been stated, is the result not so much of differences of political or legal philosophy as of a lack of knowledge on the part of each State as to what the other is doing.<sup>44</sup> Lawford believes that this uncertain and precarious situation has been prompted chiefly by the inaccessibility of the relevant treaties to the new States.<sup>45</sup> But it is also arguable that, in certain cases, the new States' vacillation may be an act of deliberate policy calculated to gain time for some thoughtful reflection. It is sometimes contended that such a period of reflection is desirable in many instances before a State could indicate whether or not it is willing to assume existing treaty obligations; for the element of reciprocity, which constitutes the effective basis of bilateral treaties, requires of necessity a careful evaluation by the States concerned of the objectives of the treaties in question. Perhaps the only category of bilateral treaties which, stricto sensu, are not reciprocal in actual effect, although certainly so in form and legal effect, may be said to be treaties relating to economic aid and financial loans from international agencies, and probably even from other States.

---

<sup>44</sup> Ibid.

<sup>45</sup> Lawford, "The Practice Concerning Treaty Succession in the Commonwealth", 5 Canadian Ybk. of International Law (1967) p. 3.



In this connection, the essential obligations of the recipient State generally appertain to the mode of use of the aid and, in certain cases, to the methods of repayment.<sup>46</sup> On the other hand, the bulk of bilateral treaties and agreements are reciprocal in law as well as in fact. The most prominent examples of these are treaties regulating trade, visas, air transport, extradition and judicial assistance.

Some of the new States did admit at the time of independence the continued validity by devolution of the treaties which had been applied by the colonial authorities to their respective territories.<sup>47</sup> Thus Cambodia, Laos and Vietnam in joint statements with France in December of 1950 not only acknowledged the continued applicability to their territories of certain multilateral treaties, but in the convention on external commerce, the four States declared

---

<sup>46</sup> This is true, for instance, of the United Nations Special Fund and Technical Assistance Board. See, for example, the United Kingdom-United Nations Special Fund Agreement of January 7, 1960, with regard to the development of projects in Singapore, in which the Fund agreed to provide assistance to the Government of the recipient State (Singapore) in accordance with the terms and conditions of Article 1(1) of the Agreement: (a) the project must consist of a plan of operation to be regarded as an integral part of the Agreement, drawn up by the Fund and Government of the territory concerned; (b) the Agreement provides for specific obligations with which the recipient Government must comply before such a project can be started. (U.N.T.S., Vol. 348, p. 177).

<sup>47</sup> For a list of the devolution agreements and the countries, see Yearbook of Int. Law Commission, Vol. II (1962) pp. 126-128.



that treaties of commerce concluded by France and relating to Indo-China remained in force.<sup>48</sup> Similarly, the Round Table Conference of November 2, 1949, between the Netherlands and Indonesia led to the conclusion of the Transitional Agreement,<sup>49</sup> Article 5 of which provided for the inheritance by Indonesia of treaty obligations affecting its territory. However, in a note dated October 18, 1963, in reply to a request for information from the Embassy of the Federal Republic of Germany in Djakarta, the Department of Foreign Affairs of the Republic of Indonesia stated:

...that article 5 of the... 1949 (Transitional Agreement) between the Republic of Indonesia and the Kingdom of the Netherlands does not cause by itself the automatic application to the Republic of Indonesia of international agreements, which were applicable to the territory of the former Netherlands Indies. For the continued application of such international agreements a further step is required on the part of the Indonesian Government, i.e., the sending of a declaration to the other contracting party (-ies) or depositary, as the case may be, that the Indonesian Government wishes to be regarded as a party to the agreement concerned in the place of the former Netherlands Indies.<sup>50</sup>

This statement, of course, assumes that the third State would be willing to concede the subrogation of the new State in the rights and obligations of its predecessor. The exper-

---

<sup>48</sup> De Muralt, The Problem of State Succession with Regard to Treaties (1954) pp. 129-130.

<sup>49</sup> U.N.T.S., Vol. 69, p. 266; ST/LEG/SER.B/14, p. 34; see also De Muralt, loc. cit., p. 134; Whiteman, Digest of Int. Law, Vol. 2, pp. 979-980.

<sup>50</sup> Materials on State Succession, ST/LEG/SER.B/14, p. 37; cf. I.L.C. Yearbook, Vol. II, 1962, p. 110.







ience of India with Argentina, however, indicates that this may not always be so, for while Argentina denied India's succession to the Treaty of Friendship and Navigation concluded with Great Britain in 1825 on the ground that this treaty had not been applied to the British colonies, it recognized, in an exchange of notes with Pakistan of December 23 and 28, 1953, Pakistan's succession to the United Kingdom-Argentina Extradition Treaty of 1889.<sup>51</sup>

Although she had accepted the principle of devolution with regard to relevant French-United States treaties in its communication of December 4, 1962, to the American Embassy, yet Malagasy declared that in order to avoid ambiguity, the Malagasy Republic would transmit, as soon as it was in a position to reach affirmative decision on each of the texts in question, a formal declaration in which it would declare itself bound by the treaty.<sup>52</sup> In November, 1962, the Charge d'Affaires of the American Embassy at Abidjan informed the State Department in Washington that the Director of Political Affairs in the Ministry of Foreign Affairs of the Ivory Coast officially stated that "France and Ivory Coast had agreed that the Ivory Coast would assume

---

<sup>51</sup> ST/LEG/SER.B/14, pp. 6-7; see also Zemanek, "State Succession after Decolonisation", 116 Hague Recueil (1965 III) p. 238.

<sup>52</sup> Unpublished memorandum of the U.S. to the Secretary-General of the U.N., December 30, 1963; U.N. Document A/CN.4/150, p. 31, para. 87.



all the rights and obligations of treaties made applicable to the Ivory Coast prior to its independence", and that "It was also agreed that the Ivory Coast would formally associate or disassociate itself from these commitments as soon as possible thereafter".<sup>53</sup> Later, in regard to the question of extradition, the same Ministry of Foreign Affairs stated:

Despite the fact that there is almost undoubtedly a Franco-American extradition treaty, which probably included the former territories of AOF within its terms, the GOIC would not feel bound by that treaty and desires that such matters be raised de novo....<sup>54</sup>

The United States Government appears to have acquiesced in the view of the Ivory Coast Government, although there is no indication that the United States actually intended to invoke any extradition treaty it might have concluded with France in its relations with Ivory Coast.

In 1960, Mali's Foreign Ministry informed the Department of State that while the Mali Government did not make a unilateral declaration affirming the continuing validity of treaties concluded prior to independence by the French Government in the name of the Government of Soudanese Republic (as Mali was then called), it considers as still valid treaties of whatever kind signed with foreign countries by the Government of France concerning the French Soudan and the Soudanese Republic, unless the Government of Mali sub-

---

<sup>53</sup> Whiteman, 2 Digest of Int. Law, p. 983.

<sup>54</sup> Ibid.



sequently signed a similar treaty with the foreign country in question, in which case the new treaty is considered to have invalidated the former one.<sup>55</sup> But after the dissolution of the Federation of Mali in August, 1960,<sup>56</sup> the Fifth Congress of the Union Soudanaise - R.D.A. renounced all prior agreements with the French Republic. This was accompanied by the renewed declaration of independence of the Soudanese Republic under the new name of the Republic of Mali on September 22, 1960. With regard to the above denunciation of former agreements with France, the Mali Ministry of Foreign Affairs drew a distinction between rights and obligations assumed towards the former administering Power, France, and rights and obligations in the international context, and explained that while this denunciation encompassed the withdrawal of Mali from the French Community and the ending of all rights and obligations towards the Community, it did not affect any agreements made by France with other foreign countries for the Sudan.<sup>57</sup> The Republic of Mali seems to have maintained this affirmative attitude in principle towards many of the treaties it inherited from

---

<sup>55</sup> Ibid., p. 984.

<sup>56</sup> U.N. Doc. A/CN.4/149 and Add. 1; SCOR, 15th Year, Suppl. for July, August and September, 1960, pp. 120-21.

<sup>57</sup> Whiteman, loc. cit., p. 984.







France,<sup>58</sup> although it is not clear from available material what its subsequent practice has been in respect of the many bilateral treaties made applicable by France to the present territory of Mali.

Congo (Brazzaville), in response to a United States note of May 12, 1961, requesting its views "on the present applicability of international agreements concluded by the Government of France on behalf of the Congo territory prior to the independence of the Republic of the Congo", acknowledged itself bound by "the treaties and agreements signed prior to its independence by the French republic and extended by the latter to its former overseas territories, provided such treaties and agreements have not been expressly denounced by it or tacitly abrogated by a text replacing them".<sup>59</sup> A unilateral declaration of this character may tempt some jurists to conclude that it constitutes evidence of universal or automatic succession to treaties by the new State concerned. Quite apart from the fact that such a conclusion cannot be substantiated by the present practice of the new States, it is probably necessary, in attempting to ascertain the reliability of such a declaration as the

---

<sup>58</sup> Cf. Its communication to the Secretary-General of the U.N. in November, 1962, admitting succession to certain international conventions concluded on its behalf by France prior to independence. I.L.C. Yearbook, Vol. II, 1962, p. 117.

<sup>59</sup> Note of August 6, 1961; U.S. T.I.A.S. 5161; U.S.T., Vol. 13, p. 2065.



criterion of subsequent practice of a new State with respect to treaty subrogation, to take into account the point in time of the declaration and the material historical factors which may have influenced the decision of a new State to make the declaration. In this connection, it should be noted that the United States which, perhaps more than any other State, relies upon the instruments of devolution as a means of ascertaining the intention of the new State to observe its international obligations, has shown a definite inclination to list any new State which is a party to a devolution agreement as party to all applicable bilateral United States treaties in its lists of "Treaties in force".<sup>60</sup> The only exception to this principle is the case of a new State, like the Malagasy Republic, which has made explicit reservation as the scope of the application of the devolution agreements in bringing about automatic devolution of relevant treaties.<sup>61</sup>

In the absence of such devolution treaties, the policy of the United States Government was to try to obtain the new State's declaration of intention as regards the assumption of international commitments undertaken on its behalf by its predecessor, frequently as a condition of recognition.

---

<sup>60</sup> O'Connell, "Independence and Succession to Treaties", 38 B.Y.I.L. (1962) p. 125; Zemanek, loc. cit., p. 236.

<sup>61</sup> Zemanek, loc. cit.



Such an assurance was sought from Nigeria,<sup>62</sup> Togo,<sup>63</sup> the Republic of Mali<sup>64</sup> and Congo (Brazzaville)<sup>65</sup> before exchanging diplomatic agents with these States. It is therefore, possible to argue that in view of the importance of the United States as a political fact in the modern world, very few new States would risk its denial of recognition to them as full members of the international society on a footing of legal equality with the United States itself. It is not, therefore, unlikely that the desire to secure immediate recognition from a big power may weigh heavily with an emergent State in making even a unilateral declaration of its intention to honour all the relevant international commitments of its predecessor. But the fundamental question remains whether even those who found it necessary to make such declarations during the early days of independence have, in fact, lived up to them.

Sometimes the request by a third State<sup>66</sup> for a new

---

<sup>62</sup> Whiteman, Digest of Int. Law, Vol. 2, pp. 209-210.

<sup>63</sup> Ibid., p. 228.

<sup>64</sup> Ibid., p. 203.

<sup>65</sup> See note 57 above, exchange of notes between the U.S. and Congo (Brazzaville).

<sup>66</sup> In a paper presented before the American Society of International Law in 1966, Professor G.P. Verbit of Columbia University, formerly the legal adviser to the Government of the Republic of Tanzania, pointed out that of the forty-odd nations that were (continued on page 427)





State's confirmation of its willingness to observe its predecessor's international obligations which had been extended to its territory prior to independence may stem from the third State's knowledge of the existence of a devolution agreement between the successor and the predecessor. Thus, an exchange of notes to this effect took place between the United States and the Government of the Federation of Malaya<sup>67</sup> after having achieved independence in August, 1957. A similar confirmation was sought, though in a less formal way, from Cyprus in 1959 by the United States. The particular circumstances surrounding this development related to a ruling by the Cypriot Comptroller of Customs requiring the use of stamps of small denominations on the importation of documents such as delivery papers and customs clearance papers. The legality of this ruling was questioned by the United States Consulate General in Cyprus in view of the existence of the United Kingdom-United States Consular Convention of 1951.<sup>68</sup> In seeking instruction from the

---

66 (continued)

parties to bilateral agreements with the United Kingdom that were applied to Tanzania, only the United States and Austria showed any interest in whether Tanzania would remain bound by pre-independence treaties (Proceedings, A.S.I.L. (1966) p. 120).

67 Aide Memoire of 15 October, 1958 and note of 17 November, 1958, concerning the U.S.-U.K. extradition treaty; Zemanek, loc. cit., p. 237; ST/LEG/SER.B/14, pp. 229-230.

68 U.N.T.S., Vol. 165, p. 121; B.T.S., 1958, No. 37; Cmd. 8289; B.F.S.P., Vol. 158, p. 423; U.S.T., Vol. 3, p. 3426; U.S.T.I.A.S., No. 2494.



State Department in 1959, the Consulate-General noted the important bearing which this question had on the pending change of sovereignty in Cyprus in 1960.<sup>69</sup> In its reply, the State Department expressed an important view which may be taken as an index of the United States general policy towards questions of succession to bilateral treaties by the new States. The United States did not believe that the impending change of sovereignty would affect the treaty obligations of Cyprus vis-a-vis customs stamp fees.<sup>70</sup> In general, it observed:

It has been true that in every instance to date when new states, formerly bound by United Kingdom treaty obligations, have achieved independence, they have subsequently indicated their adherence thereto. Nevertheless, it should be borne in mind that in the absence of applicable treaty provisions, there is no conclusive ruling covering the continuation of the application of international agreements in the case of newly independent states. The character of the act by which a dependent or semi-dependent state originally becomes bound by a treaty, the circumstances under which such area becomes an independent state, and the nature of the treaty in question, are all factors in determining whether the new state is to remain bound by treaties formerly applicable to it.<sup>71</sup>

On the basis of the above reasoning, the United States informed the American Consulate-General in Cyprus that the provisions of the United Kingdom-United States Consular Convention of June 6, 1951, "which are now in effect for

---

<sup>69</sup> Whiteman, Digest of Int. Law, Vol. 2, p. 993.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.



Cyprus, will remain in effect in the future".<sup>72</sup> It is, however, not clear what the attitude of Cyprus, since becoming independent in 1960, has been to this particular Convention. In the United Nations publication, Materials on State Succession,<sup>73</sup> containing "the texts of any treaties, laws, decrees, regulations, decisions of national courts and copies of diplomatic correspondence, concerning the process of succession as it affects States which have attained their independence since the Second World War", no mention is made of this particular convention, nor indeed of possibly many other bilateral treaties, by Cyprus even though its inheritance agreement with the United Kingdom is listed.<sup>74</sup> It is submitted that the conclusion reached by the State Department in the above statement is not adequately satisfactory as a legal basis for imputing novation because, while recognizing the importance and relevance of the nature of a treaty in determining whether or not it survives changes of sovereignty, it proceeds to base its conclusion upon the presumption of the potential survival of an agreement of a thoroughly personal character, such as the United States-United Kingdom Convention of 1951, without regard to any possible

---

<sup>72</sup> Ibid.

<sup>73</sup> United Nations Legislative Series, ST/LEG/SER.B/14, New York, 1967, pp. 21-28.

<sup>74</sup> Ibid., p. 21.





difficulties that might arise in practice as a consequence of the fact of change of sovereignty. Thus, the opinion was based upon an improper appreciation of the political significance of the shift of supreme power from the predecessor to the successor State.

In an exchange of notes between the United States and Italy on June 30, 1960, the Technical Co-operation Agreement signed on June 28, 1954,<sup>75</sup> between Italy and the United States, and applied to the Trust Territory of Italian Somaliland, was amended to provide for the succession of Somali Republic to the Italian Government in that programme of technical co-operation.<sup>76</sup> Then the United States in a note of January 28, 1961, inquired of the Somali Government whether it wished to succeed to the above agreement. In reply, the Somali Republic, in its note of February 4, 1961, agreed to its subrogation in the rights and obligations of the Italian Government with respect to the above Technical Co-operation Agreement.<sup>77</sup> This specific example would appear to be a somewhat novel development in the technique of securing succession to international rights and obliga-

---

<sup>75</sup> U.S.T.I.A.S., 3150.

<sup>76</sup> ST/LEG/SER.B/14, pp. 214-217; Whiteman, 2 Digest, Vol. 2, p. 957; Zemanek in 116 Hague Recueil (1965 III) p. 237; O'Connell, State Succession, Vol. 2 (1967) p. 74.

<sup>77</sup> ST/LEG/SER.B/14, p. 217; Whiteman, Digest, Vol. 2, p. 957.



tions. It seems so because the legal substitution of the Somali Republic for the Republic of Italy with respect to this agreement was secured at the instance of the United States, itself a third party in so far as the devolution agreement between Italy and the Somali Republic was concerned.

Oddly enough, in the exchange of letters of July 1, 1960, constituting the devolution agreement between Italy and the Republic of Somalia, and registered with the United Nations Secretariat, together with an appended list of all the agreements entered into by the Italian Government and extended to the Trust Territory of Somaliland, bilateral international agreements, even of a technical character, are not included.<sup>78</sup> It would follow that, without the United States pressure,<sup>79</sup> Italy may not have intended this technical, or other bilateral, agreement to devolve automatically, by the operation of the inheritance agreement, upon the Somali Republic. With regard, therefore, to questions affecting doctrinal principles of State succession, it does not seem possible to rely freely upon the devolution of treaty obligations brought about in this manner as conclu-

---

<sup>78</sup> Yearbook of Int. Law Commission, Vol. II, 1962, pp. 127-28.

<sup>79</sup> Zemanek also notes that "the U.S. has accepted, sometimes even encouraged, declarations of succession as from the date on which the predecessor State ratified a convention". 116 Hague Recueil (1965 III) p. 228. See also correspondence cited in O'Connell, State Succession, Vol. 2 (1967) p. 369.



sive evidence of the automatic succession of new States to international treaties.

When Pakistan came into existence in August, 1947, as a consequence of the partition of British India into India and Pakistan, it committed itself, under the terms of the Indian Independence (International Arrangements) Order, 1947,<sup>80</sup> to the inheritance of relevant treaties made applicable to it by Great Britain, the former administering authority of British India. Accordingly, Pakistan felt disposed to claim automatic succession to certain rights and duties under international treaties which had been extended to British India by the United Kingdom. Its declarations concerning multilateral treaties were discussed in detail in previous chapters.<sup>81</sup>

As regards bilateral treaties, Pakistan, in its note of September 17, 1953, to the Argentine Government, requested that the Treaty for the Mutual Extradition of Fugitive Criminals, concluded between the United Kingdom and the Government of Argentina on May 22, 1889, be regarded as remaining in force between the Argentine Republic and Pakistan by virtue of succession.<sup>82</sup> The Argentine Govern-

---

<sup>80</sup> Gazette of India Extraordinary, 14th August, 1947; U.N. Doc. A/C.6/161; GAOR, 2 sess., 6th Committee, Annex 6C, pp. 308-310.

<sup>81</sup> Supra, Chs. IV and V.

<sup>82</sup> ST/LEG/SER.B/14, p. 7.





ment, in reply to the Pakistani request, informed the Government of Pakistan that the Argentine Government had "no objection to regarding it (the treaty) as continued".<sup>83</sup> On the other hand, Argentina was, in 1958, unable to admit India's claim to succeed to the Argentine-United Kingdom Treaty of Amity, Commerce, and Navigation of 1825 on the ground that not only could India not claim the right to enjoy the benefits of a treaty to which it was never a party and which was not even applicable to its territory, but that "treaties concluded by a State do not extend ipso jure to its colonies".<sup>84</sup>

However, when Pakistan, after its creation in 1947, claimed to have inherited the Anglo-Afghanistan Treaty for the establishment of neighbourly relations, signed at Kabul on November 22, 1921,<sup>85</sup> by reason of its succession to the treaty rights of the United Kingdom, Afghanistan rejected the claim as "legally unfounded".<sup>86</sup> As to the grounds of its contention, Afghanistan maintained, first, that "Pakistan is not a successor to British treaty rights because Pakistan is a new State". This view was supported principally with the legal opinion of the United Nations Secre-

---

<sup>83</sup> Ibid., p. 8.

<sup>84</sup> Ibid., p. 7.

<sup>85</sup> B.S.F.P., Vol. 114, p. 174; B.T.S., 1922, No. 19.

<sup>86</sup> ST/LEG/SER.B/14, p. 2.



tariat,<sup>87</sup> which led to the United Nations denial of Pakistan's right to succession to membership in the world organization in 1947. Secondly, justifying its position in doctrinal terms, Afghanistan argued that

No bilateral treaty will be transferable to a third party by the unilateral action of one party to a treaty without the consent of the other original party to the treaty, and there is no provision in the 1921 treaty under which Afghanistan has given prior acceptance to the transfer of the treaty to a third party, in this case, Pakistan.<sup>88</sup>

Following the Afgan-Pakistani disagreement, the British Secretary of State for Commonwealth Relations stated in the House of Commons on June 30, 1949, that in the British Government's view, "Pakistan is in international law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom in these territories and that the Durand Line is the international frontier".<sup>89</sup> Again, when pressed for a formal statement regarding the successor status of Pakistan, the British Prime Minister affirmed on March 22, 1956, that "Her Majesty's Government in the United Kingdom fully support the Government of Pakistan in maintaining their sovereignty over the areas East of the Durand Line and in regarding this Line as the international frontier with

---

<sup>87</sup> Legal Opinion of August 8, 1947 in U.N. Press Release PM/473, August 12, 1947.

<sup>88</sup> ST/LEG/SER.B/14, p. 2.

<sup>89</sup> 446 H.C. Debates (5th ser.) col. 1491.



Afghanistan".<sup>90</sup> It would appear that, in supporting the validity and binding force of the 1921 treaty, the British Government based its view on the principle that dispositive treaties creating localized obligations are ipso jure binding upon successor States. But what is significant for the purposes of this inquiry is, first, that by challenging the validity of the Durand Line created by this treaty, Afghanistan was, in effect, challenging the universal validity of this theory. Furthermore, Afghanistan was questioning the legal effect of a unilateral assignment of treaty rights and obligations by the mechanism of inheritance agreement between the successor and the predecessor without the prior consent of one of the original parties. Afghanistan, therefore, continued to perceive the problem in political terms, and indeed when a "temporary" solution was found, it was found by a process of political adjustments between the disputants. For, through the good offices of the Shah of Iran, diplomatic relations between Afghanistan and Pakistan were resumed on May 28, 1963. With a little concession on the part of Pakistan, such as the reopening of Afghanistan's trade agencies in Peshawar and Chaman, which had been closed on the alleged ground that they were used for subversive purposes among the local population, there has been a tacit acceptance by Afghanistan of the

---

<sup>90</sup> 552 H.C. Deb. (5th ser.) col. 193.





status quo.<sup>91</sup>

In its note of September 4, 1957,<sup>92</sup> the United States Embassy in Accra proposed that treaties and agreements concluded between the Government of the United Kingdom and the United States and which were extended to Ghana be regarded as remaining in force between Ghana and the United States. But the United States also noted that "since certain treaties or agreements between the United Kingdom and the United States of America may be either inapplicable or out of date, ...consideration (should) be given at this juncture only to continuing in force the following treaties and agreements".<sup>93</sup> The attached list of treaties related to aircraft pilot licenses, air services, consular arrangements, mutual defence, economic co-operation, extradition, tenure and disposition of real and personal property, reciprocal protection of trade marks, and regulation of commerce.<sup>94</sup>

In its reply of December 21, 1957,<sup>95</sup> the Ministry of Defence and External Affairs of Ghana acknowledged the trans-

---

<sup>91</sup> The Times, London, July 5, 1963, p. 11.

<sup>92</sup> U.N.T.S., Vol. 442, p. 175; ST/LEG/SER.B/14, p. 211; 13 U.S.T., p. 240; T.I.A.S., 4966.

<sup>93</sup> ST/LEG/SER.B/14, p. 211.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid., p. 212; see also Whiteman, Digest of International Law, Vol. 2, p. 153; T.I.A.S., 4966.



fer of applicable treaty rights and obligations of the United Kingdom Government, by virtue of the devolution agreement signed on November 25, 1957,<sup>96</sup> between the United Kingdom and Ghana "in so far as their nature admits of such transfer".<sup>97</sup>

Nevertheless, a comparison of the above listed treaties and agreements (9 in all), which were provided to the Ghanaian Government by the United States, with the original Anglo-American treaties whose application was extended by the British Government to the Gold Coast (now Ghana) shows that the United States list is more comprehensive than selective.<sup>98</sup> Since the United States lists in its Treaties in Force relevant treaties of their predecessors against those new States which are parties to devolution agreements, the nine treaties indicated above were accordingly listed against Ghana.<sup>99</sup> With the possible exception of Ghana's reservation made in its letter of December 21, 1957 to the

---

<sup>96</sup> U.N.T.S., Vol. 286, p. 233; Cmnd. 345.

<sup>97</sup> ST/LEG/SER.B/14, p. 212.

<sup>98</sup> O'Connell, State Succession, Vol. 2 (1967) p. 368; Bevens, "Ghana and United States - United Kingdom Agreements", 59 A.J.I.L. (1965) p. 93; Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 491; Kenneth J. Keith, "Succession to Bilateral Treaties by Seceding States", 61 A.J.I.L. (1967) p. 542.

<sup>99</sup> Treaties in Force (State Dept. Publication) (1963); see also Treaties in Force (1966) pp. 77, 127.



United States, to the effect that "this agreement does not preclude the possibility of negotiating about the continuing in force of any particular clause or clauses of any existing treaties or any reservations that either party might wish to raise at some future date",<sup>100</sup> there is no indication as to Ghana's subsequent practice with regard to some of those treaties. However, Ghana has agreed that the relevant visa agreements concluded by the United Kingdom with the United States remain binding upon it.<sup>101</sup> India has also agreed that British extradition treaties which applied to its territory before independence be deemed as remaining in force.<sup>102</sup>

But since the automatic transfer of some of the treaties included in the American list may raise serious questions of principle, it seems doubtful whether the devolution agreement between the Government of the United Kingdom and that of Ghana (even if it could give rise to novation in certain cases) could operate to effect a mechanical transmission of such treaty rights and duties to the successor State. For instance, the 1948 Economic Co-operation Agreement,

---

<sup>100</sup> ST/LEG/SER.B/14, p. 212.

<sup>101</sup> U.S. Treaties in Force (1966) p. 127.

<sup>102</sup> I.L.A. Effect of Independence on Treaties (1965) p. 109.





Article 5,<sup>103</sup> and the 1950 Mutual Defence Agreement, Article 4,<sup>104</sup> are listed as in force against Ghana. But the 1948 Agreement provided for the supply of aid by the United States to the United Kingdom, as an integral part of the plan for European economic recovery after the war. Article 5 of that Agreement stipulates the conditions for subsequent negotiation and arrangements for the transfer to the United States from the United Kingdom of materials for stockpiling, and for the promotion of the increased production of such materials. Article 4 of the 1950 Mutual Defence Agreement provides that "The provisions of Article V of the Economic Co-operation Agreement... shall be an integral part of this Agreement". The remainder of the 1950 Agreement, which was not extended to the Gold Coast (Ghana), related to the defence arrangements of the North Atlantic Treaty Organization. That these two Agreements are of an obvious political character cannot be doubted.<sup>105</sup> It is generally agreed that

---

<sup>103</sup> Economic Co-operation Agreement between the United States and the United Kingdom, London, July 6, 1948; made applicable to the Gold Coast (Ghana), July 6, 1948; U.N.T.S., Vol. 22, p. 263.

<sup>104</sup> Mutual Defence Agreement between the United States and the United Kingdom, Washington, January 27, 1950; made applicable to the Gold Coast, July 19, 1952; U.N.T.S., Vol. 80, p. 261.

<sup>105</sup> Lester, "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963) p. 491; O'Connell, "State Succession and Problems of Treaty Interpretation", 58 A.J.I.L. (1964) pp. 56-58; see also the United States reply to this article in I.L.A., The Effect of Independence on Treaties (1965) pp. 382-86.



political treaties do not devolve upon a successor State, since they are personal to the contracting parties and are apt to lapse with the disappearance of one of the parties. The argument, therefore, that these agreements remain binding upon Ghana, either by operation of the territorial application clause,<sup>106</sup> or by virtue of the devolution agreement between the United Kingdom and Ghana, would seem to be without foundation both in theory and State practice.

Indeed, it has been contended that

The provisions of this (the Economic Co-operation) Agreement are so intimately connected with the economy of the United Kingdom that it could be argued that the territorial application was contingent upon the territories concerned remaining part of the United Kingdom.<sup>107</sup>

In judicial practice, courts have followed no consistent principle in giving or not giving effect to bilateral treaties as regards their binding authority upon successor States. Whether or not a given treaty is held to devolve will normally depend upon the intention of the contracting parties and the specific circumstances as yielded by judicial construction. It is not unlikely, however, that political or ideological considerations may, under certain conditions, exert disproportionate influence upon the judicial deter-

---

<sup>106</sup> Lester holds that "territorial application clauses" were in fact inserted in treaties only for the convenience of metropolitan States and are not indicative of any intention regarding the subsequent devolution of treaties. Loc. cit., note 103 above.

<sup>107</sup> O'Connell, loc. cit., 58 A.J.I.L. (1964) p. 57.



mination of the fate of the treaty in relation to the successor State.

In the Customs House (State Succession) Case, 1922,<sup>108</sup> the Supreme Court of the German Reich was to decide whether the arrangement created under the Treaty of Commerce between Germany and Austria-Hungary of 1891, renewed in 1905, continued in force as between Germany and Czechoslovakia, which seceded from Austria-Hungary in 1919. Under the above commercial treaty, both Germany and Austria-Hungary agreed that their respective customs houses on the frontier should, as far as possible, be established in one place to simplify proceedings. After the First World War, the regime of the common customs houses was maintained in a number of places on the German-Czechoslovak frontier. The legality of the continued arrangement was, therefore, challenged by a person accused and convicted of smuggling.

The German Supreme Court decided that the conviction must stand. It held that, although one of the parties to the Treaty (Austria-Hungary) had ceased to exist, this did not necessarily result in abolishing the legal position created by the Treaty. The Court maintained that under the existing circumstance, the will of the participants in the economic regime was decisive. Continuing, the Court pointed out that, although Czechoslovakia was not the successor of

---

<sup>108</sup> Annual Digest, 1919-1922, Case No. 41.







Austria-Hungary and was not bound by that Treaty, there was nothing to prevent her and Germany from maintaining the relation either by formal treaty or by tacit declarations of will. It is possible to infer that this decision appeared to be dominated more by the overriding concern to secure the maintenance of the customs regime, vital both to the economy of Germany and of Czechoslovakia, than by accepted principles of State succession.

In Kolovrat et al. v. Oregon, 1961,<sup>109</sup> the principle of reciprocity was emphasized in upholding the devolution upon Yugoslavia of the Treaty of 1881 concluded between the United States and the Prince of Serbia. In that case, two residents of the State of Oregon, U.S., died intestate in 1953. Their only heirs and next of kin were residents and nationals of Yugoslavia. The question to be decided was whether there was reciprocity between the United States and Yugoslavia as to the right of acquiring property by inheritance. If there had been no reciprocity, the property of the deceased would, under the relevant State law, have been taken by the State of Oregon as escheated property. The existence of recipro-

---

<sup>109</sup> U.S. Reports, Vol. 366, pp. 187-190. See also Consul General of Yugoslavia v. Artukovic (1954) in which the United States Court of Appeals held that Yugoslavia was the successor of Serbia in its international rights and obligations. Consequently, the United States-Serbian extradition treaty of 1902 was regarded as valid and as subsisting between the United States and the Federal People's Republic of Yugoslavia (I.L. Reports, 1954, p. 66).



city was to be determined by the reply to the question whether the Treaty of 1881 was still in force between the United States and Yugoslavia, the successor of Serbia.

The Supreme Court of the State of Oregon recognized that the 1881 Treaty was still in effect. This opinion was confirmed by the Supreme Court of the United States.

In contrast to the above case, the Supreme Administrative Court of Poland took a negative view of State succession in the case of Gil v. Polish Ministry of Industry and Commerce, 1923.<sup>110</sup> The proceedings in this case related to the right of the appellant, a Russian national, to carry on trade in textile goods in Lwow, situated at the time in that part of Poland which had formerly belonged to Austria. The appellant had to prove the existence of reciprocity in this regard between Poland and Russia. The Treaty of Commerce of 1906 between Austria-Hungary and the Russian Empire declared that reciprocity was assumed to exist in fact. Accordingly, the appellant contended that the Treaty of Commerce of 1906 was still in effect between the Soviet Union and the Polish Republic, as regards such parts as had been under Austrian sovereignty.

The Supreme Administrative Court dismissed the appeal, maintaining that international treaties, being based on the mutual consent of the contracting parties, are not binding

---

<sup>110</sup> Annual Digest, 1923-1924, Case No. 41.



on a State for the sole reason that part of its territory formerly belonged to one of the contracting parties. It concluded that there was lack of identity of the parties to the Treaty; consequently, the Austro-Russian Treaty of Commerce of 1906 was binding neither on Poland with regard to Russia, nor on Russia with regard to Poland.

Similarly, in Arab Bank v. Ahmed Daoud Abou Ismail, 1950,<sup>111</sup> the Tribunal of Port Said, Egypt (U.A.R.), dismissed the claim brought by the Bank based upon the Convention of January 12, 1929 between Egypt and Palestine concerning the enforcement of judgment. The plaintiff Bank had, on March 19, 1950, obtained from the Tribunal of Sicheh, Palestine (now Jordan) a judgment against the defendant, given in the name of His Majesty the King of Jordan. But the Bank moved in the Court of First Instance, Port Said, for execution of the judgment, basing itself on the above mentioned convention.

The Egyptian Court, nevertheless, held that the Bank's application must fail. The Court stated that Palestine, in the sense contemplated by the Convention of 1929, was no longer in existence. Therefore, the party with whom Egypt concluded the Convention no longer exercised any authority over Sicheh and had been replaced by another State. In virtue of the rules of public international law, the Court

---

<sup>111</sup> I.L.R., 1950, p. 314.





concluded, the said Convention had ceased to exist.

It seems difficult not to associate the attitude of the Egyptian Court to the Bank's application with the general political sentiments of the Arabs over the rather sensitive issue of Palestine.

Another case involving succession to a bilateral treaty was Re Westerling.<sup>112</sup> Indonesia had applied for the extradition from Singapore, in 1950, of Westerling, a Dutch national accused of the commission of crimes in the island of Java. In support of its application, Indonesia contended that it had succeeded to the rights of the Netherlands Government under the Anglo-Netherlands Extradition Treaty of 1898 and the related Order-in-Council of the United Kingdom of 1899. Westerling moved to the High Court of Singapore an order of prohibition to stay the extradition proceedings in the Criminal District Court, on the ground that there was no extradition treaty in force between the United Kingdom and Indonesia, and that, even if there was, the Extradition Act of 1870 did not apply for lack of an executive order reciting the treaty and extending it to Singapore. The Attorney General informed the Court, on the authority of the British Secretary of State for Foreign Affairs, that Indonesia had succeeded to the rights and

---

<sup>112</sup> I.L.R., 1950, Case No. 21; ST/LEG/SER.B/14, p. 194;  
1 Malayan L. Reports 228.



obligations of the Kingdom of the Netherlands under the Anglo-Netherlands Treaty of 1898 and that the Treaty now applied between the United Kingdom and Indonesia.

Notwithstanding the conclusive character of the statement as regards Indonesia's succession to the rights emanating from the 1898 Treaty, the Court refused to apply the Treaty, pointing out that there had been no appropriate Order-in-Council extending the 1898 Treaty specifically to Indonesia. The Court argued that in municipal law, extradition was dependent upon the existence of a treaty- affirmed in this instance by executive evidence - and an appropriate Order-in-Council incorporating the treaty into municipal law. The absence of the second condition, in the view of the Court, rendered the Treaty inapplicable to Indonesia.

When Indonesia later applied to the Netherlands for the extradition of Westerling, on the understanding that the former inter se rendition arrangements would continue, the Dutch High Court refused to extradite him because of his Dutch nationality.<sup>113</sup>

---

<sup>113</sup> Green, "Recent Practice in the Law of Extradition", 6 Current Legal Problems (1953) p. 293. This particular case was probably responsible for Indonesia's insistence at the Asian-African Legal Consultative Committee's Third Session at Colombo, Ceylon, in 1960, that in determining the character of offences for the purposes of extradition, Member States should be guided by the principle that an alien should never be permitted to plead that his offence was of a political character; for, in Indonesia's opinion, a political crime can only be committed by a national against the State of his nationality. A.A.L.C.C. Report, 1960, p. 194; see also L.C. Green, "Political Offences, War Crimes and Extradition", 11 I.C.L.Q. (1962) p. 329 at p. 335.



The above examination of the practice of local courts discloses that the content of judicial decisions affecting succession to bilateral treaties may well be expressive not only, in certain cases, of the economic or ideological predispositions of the judges, but also, and more importantly, of their national policy.

#### 4. Succession Relating to Economic Concessions

Although the question of succession to treaties relating to economic concessions is predominantly a problem of municipal law, certain aspects of it are of direct interest to international law, at least in so far as the doctrine of State responsibility may be involved. An economic concession has been defined as "a contract between a private person and a State, usually under the latter's municipal law, by which the former undertakes the construction, operation and maintenance of public works, and the latter agrees in return for payment of royalties to permit him to run the undertaking for a definite length of time to recoup his investment and make a profit".<sup>114</sup> The concessionaire, under a contract, acquires not only a right in personam against the State, but also a right in rem, since the concession is frequently associated with land in the nature of a lease.<sup>115</sup> A con-

---

<sup>114</sup> O'Connell, International Law, Vol. 1 (1965) p. 443.

<sup>115</sup> O'Connell, Law of State Succession (1956) p. 77.





cession contract is thus of a mixed legal character, containing elements of both private and public law.<sup>116</sup> This fact was recognized by the Permanent Court of International Justice in the Lighthouse case<sup>117</sup> between France and Greece when it pointed out that "a contract granting a public utility concession does not fall within the category of ordinary instruments of private law". To the extent, however, that the interest of the private person, whether corporeal or incorporeal, under such a contract is of "assessable monetary value",<sup>118</sup> it constitutes an acquired right. Where the private party to the contract is a national of the State with which the contract is signed, the legal relationship thus created between the State and the private person is regulated, not by international law, but exclusively by the municipal law of that State. Where, on the other hand, the private party to the contract is an alien, then the legal interests of the parties, though a matter largely within the ambit of the domestic law of the contracting State on whose territory the concessionaire is to operate, becomes at least marginally regulated by international law.<sup>119</sup>

---

<sup>116</sup> Fatouros, Government Guarantees to Foreign Investors (1962) p. 196.

<sup>117</sup> P.C.I.J. (1934), Ser. A/B, No. 62, p. 20.

<sup>118</sup> O'Connell, The Law of State Succession (1956) p. 81.

<sup>119</sup> Only to the extent that international law may be held to impose an obligation upon the State to respect the interest (acquired right) to the alien, or, in the event of expropriation for public purposes, to make some measure of compensation.



But in so far as the impact of change of sovereignty may affect such concessionary contracts, the question arises as to whether, and to what extent, a new State succeeds to the predecessor's contracts by operation of law. Robert Delson,<sup>120</sup> speaking before the American Society of International Law in 1966, outlined four possible attitudes to this question. First, it may be argued that the new State not only succeeds ipso jure to the contract, but is bound even to a greater extent than its predecessor, in that it may not properly exercise the right of expropriation even though its predecessor could; second, that the successor State is bound to the same extent as its predecessor, either in the sense that it is subrogated ipso jure to the contract, or, if it is not subrogated, that at least it is obliged to make indemnity to the same extent as its predecessor; third, that the successor does not succeed ipso jure to the rights and obligations flowing from the contract of its predecessor, but retains the option to succeed to such rights and duties, and that if it is under any obligation to indemnify, in the event of non-succession, the measure of compensation is far less than that of its predecessor. The fourth approach to the problem would be to take into account the circumstances under which the many independent States were emerging.

---

<sup>120</sup> "Comments on State Succession", Proceedings, A.S.I.L. (1966) p. 111.



According to Delson, this particular approach would lead to a presumption of non-subrogation "based on such factors as the imposition on a dependent territory of a contract contrary to its basic interests".<sup>121</sup>

That this is reflective of the limited and tenuous dimension of consensus even among contemporary jurists as to what the law of State succession ought precisely to be with regard to concessionary contracts can be seen from the discussions and resolutions of the International Law Commission Sub-Committee on State Succession,<sup>122</sup> as well as of the International Law Association State Succession Committee.<sup>123</sup> But what is the position of international law concerning succession to economic concessions?

To the extent that the legal interest of the private party is involved, Professor O'Connell, in his earlier works declared that although "change of sovereignty has no effect

---

<sup>121</sup> Ibid.

<sup>122</sup> See, e.g., report by Manfred Lachs, Chairman, Sub-Committee on State Succession, U.N. Doc. A/CN.4/160, June 7, 1963; Memorandum by A.H. Tabibi, Ibid., Annex II, p. 8 at p. 19; Castren, Ibid., Annex II, Appendix, p. 3; Bartos, "Working Paper", Ibid., Annex II, Appendix, p. 15; see also Report of the International Law Commission" of May 27 - August 2, 1968, GAOR, 23rd sess., suppl., No. 9 (A/7209/Rev. 1), pp. 21-31.

<sup>123</sup> I.L.A. Report, 1966, pp. 557-572; Interim Report of the Committee on State Succession, I.L.A. Conference, Buenos Aires, 1968; see also Tabata, "Report of the Committee on State Succession" (Japan Branch of International Law), Japanese Annual of Int. Law, No. 9 (1965) pp. 167-174.





on this interest.... the successor State is not a party to the contract, unless by novation on his own part, and hence its future obligation is only to satisfy the equities".<sup>124</sup>

Elsewhere, he recorded the firm view that

...the existence in international law of the notion of absolute inheritance has not been acknowledged in modern scientific research. On the other hand, to argue that rights and duties do not pass ipso jure from the predecessor to the successor State is not to deny that the latter may incur some obligation in international law towards the former's creditors and co-contractors.<sup>125</sup>

However, in a later article, O'Connell appears inclined to the view that automatic succession to concessionary contracts must now be accepted as the norm.<sup>126</sup>

Oppenheim states that "concessionary contracts require a special consideration", particularly if they are of a local character. Where, before the disappearance of the old State which granted the concessions, every act necessary for vesting them in the holder had been performed, they are likely to survive. But he stresses that "every case must be studied on its merits, and it is difficult to lay down a general

---

<sup>124</sup> O'Connell, International Law, Vol. 1 (1965) p. 443.

<sup>125</sup> O'Connell, The Law of State Succession (1956) pp. 77-78.

<sup>126</sup> "Independence and Problems of State Succession", in O'Brien (ed.), The New Nations in International Law and Diplomacy (1965) pp. 29-30.

<sup>127</sup> Oppenheim, International Law, Vol. 1 (8th ed., 1955) p. 162.



principle".<sup>128</sup> On the other hand, C.C. Hyde<sup>129</sup> recognizes that at least where a contract is detrimental to the successor State, the successor is under no obligation to perform it. However, he appears to limit such contracts to those in which "the very nature of the agreement is such as to forbid the conclusion that it could be reasonably deemed beneficial if a change of sovereignty took place". This principle with respect to contracts thus appears analogous to that applicable in the case of political treaties, which are deemed not to survive on the ground of inconsistency with the policies of the successor State. It is submitted that Hyde's position is not without the influence of the earlier American doctrine that for a concession to remain valid and binding upon the successor State it must not only be locally connected, but it must be granted for its exclusive benefit.<sup>130</sup> Wolfgang Friedmann, a leading advocate of the doct-

---

<sup>128</sup> Ibid.

<sup>129</sup> Hyde, International Law, Vol. 1 (2nd rev. ed., 1947) p. 429. See also Wilkinson, The American Doctrine of State Succession (1934) p. 115.

<sup>130</sup> Thus, after Spain ceded the Philippines and Cuba to the U.S. in 1898, the question of American respect for economic concessions granted by Spain to foreign Companies was raised. The Attorney General advised the U.S. Government that the concession granted to the Manila Railway Company (British-owned) to build a railway in the Philippines had been inspired entirely by Spanish imperialistic motives, as such the concession was not in the exclusive interest of the local territory. The best therefore that the U.S. could do was to acknowledge an obligation of equity to pay some (continued on page 453)



rine of "unjust enrichment"<sup>131</sup> in international law, takes a somewhat different approach. He seems inclined to the position that in the event of a termination of its predecessor's concessionary contract by the successor State the principle of unjust enrichment can be applied as a general principle of international law in the peaceful and fair adjustment of the differences between the capital-exporting and the capital-importing countries; however, this can be done only by going back to the basic equities of the situation, and these equities include a recognition of the fact that the foreign interests have themselves been the beneficiaries of unjust enrichment which must be taken into account in striking a balance.<sup>132</sup> Despite the advocacy of the adoption

---

130 (continued)

compensation to the concessionaire for the advantages which the new administration might derive from the laying of the railway. Moore, Digest of Int. Law, Vol. 1 pp. 398-404. A similar attitude was taken by the U.S. to the British owned Cuba Telegraph Company, an attitude rejected by the United Kingdom Government (see, e.g., The Law Officers Opinion of November 30, 1900, F.O. Confidential Papers (7516) No. 44). However, the original American view seems to have been revised in recent years. This can be seen from Article 12 of the Harvard Research (1961) on International Responsibility of States for Injuries to Aliens which states that "the violation through an arbitrary action of a State of a contract or concession to which the central government of that State and an alien are parties is wrongful". Whiteman, Digest, Vol. 8, p. 1071. This is confirmed by the American Law Inst. Restatement of the Law, Foreign Relations Law of the U.S. (1965) pt. IV, p. 587.

<sup>131</sup> See, e.g., The Changing Structure of Int. Law (1964) pp. 206-210.

<sup>132</sup> Friedmann, "The Uses of "General Principles" in the Development of International Law", 57 A.J.I.L. (1963) pp. 297-299.







of the principle of unjust enrichment as a general principle of international law which might be employed in the settlement of claims regarding the concessionary rights of aliens adversely affected, or likely to be so affected, by the policy of a successor State, Friedmann's proposal merely reveals the intensely political character of the current debate over the formulation of acceptable principles of State succession that would provide adequate protection to foreign contractual interests in the territories of the new States. This fact was brought out forcefully by Mr. Mustafa Kamil Yasseen of Iraq, a member of the International Law Commission of the U.N., in his working paper on the development and codification of the law of State responsibility. He said:

...responsibility for injury to aliens does not seem to me to be a topic that can readily be codified at the present time.... The positions of States in this matter differ widely and are firmly held. In the present period of the liquidation of the colonial regime and the correction of certain privileged situations obtained under that regime, it is difficult to ensure a calm atmosphere for working out a generally accepted code of law. Our era of rapid evolution, or, rather, of revolution, is in my opinion the least favourable for the defining of general rules capable of governing these matters which are directly affected by this rapid evolution. The questions encompass an infinite number of slightly different cases which require flexible solutions; these should be based first and foremost on the idea of justice, the principle of State sovereignty over natural resources and wealth and the economic and social conditions prevailing in certain societies.<sup>133</sup>

---

<sup>133</sup> Yearbook of International Law Commission, Vol. II, 1963, p. 251.



To appreciate the complexity of the problem, attention must be drawn to the use by Mr. Yasseen of those concepts which, as noted in Chapter I, the new States have regarded as an integral part of the "newly developed norms" of international law to which they have given their consent. These include "justice" and "the principle of State sovereignty over natural resources and wealth", presumably based upon General Assembly Resolution 1803 (XVII)<sup>134</sup> on Permanent Sovereignty over Natural Resources. Tied in with this is the well-known controversy over the traditional theory of "respect for acquired rights", and the question whether the concessionaire whose contractual interests may be injured through the nationalization or expropriation measures of a new State is subject to "the national standard of equal treatment" (i.e., must be regarded as on a footing of legal equality with the nationals of the expropriating State), or is to be treated in accordance with "the international minimum standard of justice".<sup>135</sup> It is suggested that the position represented by Mr. Yasseen is not substantially different from the general theoretical posture of the new

---

<sup>134</sup> G.A. Res. 1803 (XVII), December 14, 1962.

<sup>135</sup> See, e.g., E.M. Borchard, "'Minimum Standard' of the Treatment of Aliens", Proceedings, A.S.I.L. (1939) p. 60; "'The Minimum Standard' of the Treatment of Aliens", 38 Michigan Law R. (1940) pp. 445-456; B.A. Wortley, Expropriation in International Law (1959) p. 55; G. White, The Nationalization of Foreign Property (1961) pp. 162-179.



Afro-Asian States regarding this crucial aspect of the law of State succession. Before examining the actual practice of the newly independent States, as evidenced by their policy declarations, diplomatic correspondence, or post-independence economic measures, it seems appropriate to inquire into some prevalent judicial precedents relating to succession to economic concessions.

While there is a long line of judicial decisions supporting the principle of respect for private rights and vested interests,<sup>136</sup> it is perhaps necessary to limit our discussion to those arbitral or judicial decisions affecting the subrogation of successor States to the concessionary rights and obligations of their predecessors. The Mavrommatis case<sup>137</sup> probably affords the most relevant example. Protocol XII to the Treaty of Lausanne<sup>138</sup> provided for the subrogation of the mandatory powers in the concessionary interests of Turkey in her lost provinces. A claim against Great Britain, as the Mandatory in Palestine, was brought by Greece before the Permanent Court of International Justice on the ground that

---

<sup>136</sup> See German Settlers case, P.C.I.J., Ser. B, No. 6 (1923) p. 36), "Private rights acquired under existing law do not cease on a change of sovereignty.... It can hardly been maintained that, although the law survives, private rights acquired under it have perished". See also, Certain German Interests in Polish Upper Silesia, P.C.I.J., Ser. A, No. 7 (1926) p. 22.

<sup>137</sup> P.C.I.J., Ser. A, No. 5 (1925) pp. 27-31.

<sup>138</sup> L.N.T.S., Vol. 28, p. 11; B.T.S., 1923, No. 16; Cmd., 1929; B.F.S.P., Vol. 117, p. 543.







Great Britain had wrongfully refused to give full recognition to a number of concessionary contracts entered into by Mavrommatis, a Greek national, with the Ottoman authorities in Palestine before Britain became the Mandatory on behalf of the League of Nations. The Court not only stated that the principle of subrogation was one of general international law,<sup>139</sup> but held that Britain was under an obligation to respect the concessions of Mavrommatis in accordance with the provisions of Article 9 of Protocol XII of the Treaty of Lausanne.<sup>140</sup>

It seems doubtful whether the existence in general international law of a rigid principle of subrogation is universally acknowledged. The acceptance of such a principle would of necessity call for a more precise definition of the nature of the legal duties of the successor State, for succession ipso jure to the concession contracts of the predecessor State would imply that the successor State is bound by all the terms of the concessions regardless of its will. This would automatically deprive the successor State of the sovereign discretion to cancel, or even to modify, their terms without the express consent of the concessionaire. Indeed, it has been asserted that

...it cannot be admitted that international law recognizes so stringent a rule. Not only is subrogation not

---

<sup>139</sup> Loc. cit., note 137 above at p. 27.

<sup>140</sup> Ibid., at p. 31.



demanded by the doctrine of acquired rights, but the arguments against it are considerable. In the first place subrogation could come about only by devolution of the contract of concession. Such a devolution is dependent on the acknowledgment in international law of the doctrine of universal succession, a doctrine now everywhere rejected.<sup>141</sup>

In the Sopron-Koszeg Railway case (1929),<sup>142</sup> the Arbitral Tribunal, established by a decision of the League of Nations Council of September, 1928, did not so much attempt to assert the existence of a general rule of subrogation in international law as endeavour to reconcile and balance the conflicting interests of the successor State and the concessionaire. In 1907 the Sopron-Koszeg Railway Company had been granted a ninety year railway concession by the Royal Hungarian Government. Under an agreement between the Government and the Company in 1909, the Government took over the operation of the railway, subject to the payment to the Company of an agreed share of the receipts. Following the territorial changes brought about by the Treaties of St. Germain-en-Laye<sup>143</sup> and Trianon,<sup>144</sup> the middle section of the railway passed through Austria and the two ends remained in Hungary. Article 320 of the Treaty of St.

---

<sup>141</sup> O'Connell, The Law of State Succession (1956) p. 130.

<sup>142</sup> Annual Digest, 1929-1930, Case No. 34; R.I.A.A., Vol. II, p. 961.

<sup>143</sup> B.F.S.P., Vol. 112, p. 514; B.T.S., 1919, No. 17; Cmd. 400.

<sup>144</sup> B.F.S.P., Vol. 113, p. 486; B.T.S., 1920, No. 10; Cmd. 896.



Germain and Article 304 of the Treaty of Trianon provided that the railways of the former Austro-Hungarian Monarchy which passed through several States were to be subjected to administrative and technical re-organization by agreement between the railway company and the States concerned. The railway company reached agreement with Hungary, but failed to do so with Austria. In determining the validity vis-a-vis Austria of the concession contract, the Tribunal held that, apart from the treaty provisions, the contract could be regarded as neither completely nullified nor wholly unaffected by the change. It therefore recognized the legitimate interests of the successor State as well as those of the concessionaire.

The question of succession to concessionary contract was also tested in the Lighthouses case, 1956,<sup>145</sup> between France and Greece. The case involved the arbitration of a number of claims and counterclaims between the two States connected with a concession contract granted to a French Firm, Collas & Michel by the Ottoman Empire for the construction of lighthouses. Although Greece was not held responsible by the Arbitral Tribunal in respect of all the claims (as, for example, with regard to Claim No. 11), the Tribunal affirmed with respect to Claim No. 4, that Greece, as a successor State, was bound to respect the private right

---

<sup>145</sup> I.L.R., 1956, p. 81.





conferred by the contract. While the Tribunal was clearly in favour of encouraging the maximum possible respect for the concessionary rights, it made the important observation, however, that "it is impossible to formulate a general, identical solution for every imaginable hypothesis of territorial succession, and any attempt to formulate such a solution must necessarily fail in view of the extreme diversity of cases of this kind".<sup>146</sup>

On the other hand, in the Shimshom Palestine Portland Cement Factory Ltd. v. Attorney General (1950)<sup>147</sup> the Supreme Court of Israel found the opportunity not only to affirm that Israel is not the successor of the Government of Palestine, but to reject the doctrine of "universal" succession and the view that such a doctrine was automatically applicable to Israel. To indicate the unsettled character of the law of succession to concession contracts, the Court rhetorically asked, "if there is doubt how far a successor State is bound by the contracts and concessions of its predecessor, how much the more is this so as regards a State which is not a successor". The thesis of general subrogation was similarly rejected by the same Court in the Pales Ltd. v. Ministry of

---

<sup>146</sup> Ibid., p. 91.

<sup>147</sup> Ibid., 1950, Case No. 19. For the view that Israel is in fact the successor of Palestine, see Green, 37 Tulane Law Review (1963) p. 670.



Transport (1955),<sup>148</sup> a case involving the termination of a concession contract granted by the British High Commissioner to the appellant company for the construction of bookstalls on the Haifa Central Railway Station. The fact that both the Israeli Government and Courts have refused to admit the principle of universal and automatic succession, whether in respect of treaties or concessionary contracts, does not imply that the policy of the Government of Israel is to repudiate succession in every sense. Quite the contrary. Informing the Secretary-General of the U.N. of its official attitude towards concessionary rights since the State of Israel came into existence, Israel declared:

The Government of Israel continued to respect existing concessionary rights relating to its territory in so far as these had been previously granted or recognized by the Government of Palestine, and in the course of time has proceeded to negotiate with the concessionaires the adaptation of concessionary rights to the new conditions.<sup>149</sup>

This, no doubt, smacks more of a pragmatic policy than a policy which adheres inflexibly to a stringent and abstract doctrinal position. Such a pragmatic approach has the merit of enabling a new State to introduce such necessary economic or political adjustments as may be consistent with its public policy, since it is widely admitted that the incidence of territorial change of sovereignty may materially affect a

---

<sup>148</sup> I.L.R., 1955, p. 113.

<sup>149</sup> ST/LEG/SER.B/14, p. 14, para. 17.



State's entire politico-economic structure.

All these examples, while not exhaustive of the different kinds of cases involving concession contracts, are illustrative of the various considerations which may determine whether or not judicial recognition is given to the binding effect upon a successor State of its predecessor's concessionary contracts. The principal feature of all this, however, is the marked judicial tendency to uphold the principle of respect for private rights. But the successor State is under no legal duty to maintain unchanged, or perpetually, the legal interest of the concessionaire.<sup>150</sup> What is significant is that the concessionary right is entitled to a degree of legal protection, though not against impartial or non-discriminatory modification dictated by considerations of public interest. Should the concessionary rights, therefore, of an alien be expropriated by a successor State international law requires that some measure of compensation must be made to the injured alien by the expropriating State.<sup>151</sup> This is not a duty incumbent exclusively upon the successor qua successor; it is an obligation imposed upon all States - successor or not - by international

---

<sup>150</sup> This was confirmed in Heirs of Mohamed Selim v. The Government of Palestine, Annual Digest, 1935-1937, Case No. 39.

<sup>151</sup> Sayre, "Change of Sovereignty and Private Ownership of Land" and "Change of Sovereignty and Concessions", 12 A.J.I.L. (1918) p. 475; Friedmann in 57 A.J.I.L. (1963) p. 279.







law;<sup>152</sup> it is, moreover, a prohibition against confiscatory expropriation by any State.

##### 5. Practice of the New States Relating to Economic Concessions

The actual practice of the new States in respect of succession to economic concessions may be said to be still in the process of unfolding; consequently the few available instances will at best admit of only very cautious and tentative generalization. Many of the new States have as yet adopted no clear-cut policy towards any concessionary contracts of their predecessors that may be alleged to have devolved upon them as successors. A hasty action, a new State may assume, is likely to lead to serious complications. We shall attempt at the end of this survey to explain how this cautious attitude on the part of most of the new States is a function of their actual economic and political conditions.

Shortly before the metropolitan States handed over power to the new States, attempts were made to ensure and safeguard the continued protection of acquired rights and vested interests within the territory of the new States. Under the British system, this was achieved through incorporation in the newly framed constitutions of these States

---

<sup>152</sup> Even G.A. Res. 1803 (XVII) of December 14, 1962 on Permanent Sovereignty over Natural Resources expressly confirms this rule of international law.



of provisions safeguarding fundamental rights and freedoms.<sup>153</sup> In the Treaty of Alliance with Transjordan, a clause for the protection of British commercial concessions is to be found.<sup>154</sup> Similarly, a provision to protect concessionary contracts held by British subjects or companies owned or controlled by British subjects was embodied in the Treaty with Burma.<sup>155</sup> However, in an exchange of notes annexed to this treaty, agreeing to the protection of such vested rights in Burma, the Prime Minister of Burma qualified the attitude of his Government to the effect that "the undertaking given in the preceding paragraph must be read as subject to the provisions of the Constitution of the Union of Burma as now adopted, and in particular of the policy of state socialism therein contained to which my Government is committed. If, however, the implementation of the provisions... of the Constitution should involve the expropriation or acquisition in whole or part of existing United Kingdom interests in Burma, the provisional Government of Burma will provide equitable com-

---

<sup>153</sup> See, e.g., s. 34 of the Ghana (Constitution) Order-in-Council, 1957, Statutory Instruments 1957, No. 277; the Kenya Independence Order-in-Council 1963, Statutory Instruments 1963, No. 1968, schedule 2, s. 19. There is, however, a marked absence of a corresponding provision in the Tanganyika (Constitution) Order-in-Council, 1961, Statutory Instruments 1961, No. 2274.

<sup>154</sup> U.N.T.S., Vol. 6, p. 147 (Article 10).

<sup>155</sup> U.N.T.S., Vol. 70, pp. 190-193, Art. 7(a).



pensation to the parties affected".<sup>156</sup>

The French approach has focused on the signing of "Co-operation Agreements on Monetary, Economic and Financial Matters" with the dependent State shortly before it acquires its full statehood. Such agreements were concluded with the Malagasy Republic<sup>157</sup> and the Federation of Mali<sup>158</sup> in 1960. In the Evian Agreement concluded between the French Government and the Provisional Government of Algeria in 1962, Algeria agreed under Article 12 to "ensure without any discrimination the free and peaceful enjoyment of patrimonial rights acquired in its territory before self-determination" and that "no one will be deprived of these rights without fair compensation previously agreed upon".<sup>159</sup> Other French rights safeguarded under the same agreement include certain mining and transport concessions in the northern Algerian departments (Art. 14), and concessions in the Sahara for the exploitation of the wealth of the Saharan

---

<sup>156</sup> Exchange of Notes of October 17, 1947, Nos. 1, 2, 3, Ibid., pp. 194-98.

<sup>157</sup> Journal Officiel de la Republique Francaise, Lois et Decrets, July 20, 1960, pp. 6612, 6615.

<sup>158</sup> Ibid., p. 6637; Whiteman, Digest of International Law, Vol. 2, p. 834.

<sup>159</sup> Texts of Declarations Drawn Up in Common Agreement at Evian, March 18, 1962, Journal Officiel de la Republique Francaise, Lois et Decrets, March 20, 1962, p. 3025; Whiteman, loc. cit., pp. 833-34.





subsoil.<sup>160</sup> In the American-Philippine Treaty of General Relations,<sup>161</sup> there are provisions safeguarding the property rights of United States citizens. The Netherlands also sought to protect the private rights and concessions of Dutch nationals against risks in its Financial and Economic Agreement with the Indonesian Government in 1949.<sup>162</sup> However, allowance was made for future expropriation, subject to prior compensation or guaranteed indemnification. The amount to be paid was to be fixed by a court of law on the basis of the real value of the property affected by any act of expropriation.<sup>163</sup> Signs of change began to emerge when, on August 17, 1950, Indonesia changed its federal system back to its original unitary system and its name from 'the United States of Indonesia' to 'the Republic of Indonesia'. Thus, on August 17, 1950, the Constitution of the United States of Indonesia was replaced by the Provisional Constitution of the State of the Republic of Indonesia of 1950. With the re-proclamation of the Constitution of 1945 on July 5,

---

<sup>160</sup> Journal Officiel, loc. cit., p. 3026.

<sup>161</sup> U.N.T.S., Vol. 7, Article 6, pp. 6-8.

<sup>162</sup> U.N.T.S., Vol. 69, Articles 1-3, pp. 232-34; Whiteman, Digest, Vol. 2, pp. 834-35; see also ST/LEG/SER.B/14, pp. 34-38.

<sup>163</sup> Loc. cit., n. 162 above, Art. XXII. The Government of Indonesia regards this agreement as abrogated following an act passed by the Indonesia legislative assembly on April 23, 1956, Whiteman, loc. cit., pp. 835, 851.



1959, the 1950 Provisional Constitution was again replaced by the 1945 Constitution.<sup>164</sup> These constitutional changes implied that Indonesia had re-asserted its complete autonomy and was now prepared to pursue an independent economic policy "consistent with the interests and economic development of the people of the territory".

As a result of the political conflict between the Netherlands and Indonesia over West New Guinea (Irian Barat),<sup>165</sup> the latter decided to apply economic pressure to force the former to relinquish control over the area in question. Under Indonesian Act No. 86 of December 31, 1958,<sup>166</sup> the Indonesian Government nationalized all Dutch-owned property in the Republic of Indonesia. Under Article 7, the Act was made retroactive as of December 3, 1957. The pertinent clauses of the Act state

a. that measures taken by the Government with regard to Dutch-owned enterprises situated within the territory of the Republic of Indonesia, as part of the struggle

---

<sup>164</sup> Note by the Government of Indonesia, ST/LEG/SER.B/14, p. 31, n. 1.

<sup>165</sup> For the text of the Netherlands-Indonesian Agreement concerning the transfer of administration over West New Guinea first to the U.N. and then to Indonesia after May 1, 1963, see U.N. Doc. A/5170 and Add. 1, Annex A; ST/LEG/SER/14, p. 36, Article XXII.

<sup>166</sup> For a text of the Act see "The Status of Permanent Sovereignty over Natural Wealth and Resources", Preliminary Study by the Secretariat, U.N. Doc. A/AC.97/5, December 15, 1959, see also English text in 6 *Nederlands Tijdschrift voor Internationaal Recht* (July, 1959), Appendix, p. 291.



for the liberation of Irian Barat (West New Guinea), are consistent with the policy of annulling the Round Table Conference (R.T.C.) Agreements;

b. that in the present stage of the aforementioned struggle in the framework of annulling the R.T.C. agreements and liberating Irian Barat, the moment has come to make a definite pronouncement on Dutch-owned enterprises... and nationalize Dutch-owned enterprises into State property;

c. that the nationalization of the aforementioned Dutch-owned enterprises is intended to provide the Indonesian society with the greatest possible benefit as well as consolidate the security and the defence of the State.<sup>167</sup>

This Indonesian nationalization programme was vehemently protested by the Netherlands Government as illegal under international law, particularly because of the purpose for which the property was taken. In a diplomatic note delivered to the Indonesian Government on February 28, 1959,<sup>168</sup> the Netherlands Government outlined the bases of illegality of the act as follows: (1) it was based on the exertion of pressure in the political dispute over the territory of West New Guinea; (2) it was discriminatory in that it was directed solely against aliens of one particular nationality (Dutch); (3) the measures were confiscatory since there was no question of "prompt payment of reasonable compensation". Moreover, the note stated that the Netherlands Government, because of the illegality of the nationalization act and any takings

---

<sup>167</sup> U.N. Doc. A/AC.97/5, December 15, 1959, p. 139; Whiteman, Digest of Int. Law, Vol. 8, p. 1048.

<sup>168</sup> For full text of notes between the two Governments see 54 A.J.I.L. (1960) pp. 484-490; Whiteman, Ibid., p. 1140.





under it, was of the view that the announced nationalization could not, under international law, cancel or transfer the property and other rights of Dutch owners. The Netherlands Government believed that this property and its fruits still belonged to the Dutch owners. Thus, in its view, the illegality of the act did not even depend on the question whether or not the Indonesian Government would pay the interested parties reasonable indemnification.

In its note of April 8, 1959,<sup>169</sup> the Indonesian Government replied, *inter alia*, that as a sovereign State, the Republic of Indonesia had the right to decide independently on the nationalization of the private property of aliens and that the Nationalization Act recognized the obligation to pay compensation. It further argued that the aim of the nationalization of Dutch-owned enterprises was to "normalize the well-being of the Indonesian people and to abolish economic discrimination".

In the three North African States of Morocco, Algeria and Tunisia, which were formerly under French control, programmes of economic reform have been adopted which, despite elaborate French effort to safeguard French private and concessionary rights in these territories, have adversely affected some of those rights. The Moroccan Government's drive for broad agrarian reform had the effect of encroaching

---

<sup>169</sup> Whiteman, Ibid., pp. 1049-1140.



upon large agricultural estates held by individual French nationals or French-owned corporations.<sup>170</sup> This led to the negotiated settlement of July 24, 1964, in which France agreed to the payment of the greater part of the indemnification due to the expropriated French nationals.<sup>171</sup> Similarly, French agricultural interests were seriously affected after Tunisia had embarked on its agrarian reform scheme in the 1960's. To cushion the impact of the Tunisian Government measures upon French interests in that territory, France and the Government of Tunisia reached two agreements in 1960 and 1963; under these agreements, Tunisia was allowed to acquire 150,000 hectares of French-owned agricultural land for which France again would pay the greater portion of the compensation.<sup>172</sup> On May 12, 1964, however, a Tunisian legislative act nationalized all the remaining foreign-owned agricultural estates, most of which belonged to French nationals. The Tunisian Government only provided in prin-

---

<sup>170</sup> Zemanek, "State Succession after Decolonisation", 116 Hague Recueil (1965) p. 286.

<sup>171</sup> Charles Rousseau, "Chronique des faits internationaux, France et Maroc", 68 R.G.D.I.P. (1964) pp. 941-43.

<sup>172</sup> H. Thierry, "La cessation a la Tunisie des terres des agriculteurs francais", 9 A.F.D.I. (1963) pp. 933-48.



ciple for non-transferable compensation.<sup>173</sup>

France reacted to the Tunisian action by suspending all financial assistance to that country. Negotiations between the two Governments were undertaken in January, 1965, but without any worthwhile results. However, Tunisia was able to reach an agreement with Switzerland on July 24, 1965 with respect to the compensation of the Swiss nationals affected by the Tunisian nationalization act.<sup>174</sup> In it, the Swiss Government agreed that part of its financial aid to Tunisia be used for compensating injured Swiss nationals. The United Kingdom and Italy strongly protested against the Tunisian measure, too.<sup>175</sup>

In spite of the Evian Agreements concluded between France and Algeria on March 18, 1962,<sup>176</sup> which sought to protect French interests in Algeria, the Algerian Government undertook a gradual measure of nationalization in accordance with Article 13 of that agreement, which recognized the need for agrarian reform in Algeria. On September 29, 1963,

---

<sup>173</sup> Rousseau, "Chronique des faits internationaux Tunisie", 68 R.G.D.I.P. (1964) pp. 964-69; J. Charpentier, "Pratique française du droit international; Nationalisations", 19 A.F.D.I. (1964) p. 944; Zemanek, loc. cit., p. 289.

<sup>174</sup> Zemanek, loc. cit., p. 289, n. 85.

<sup>175</sup> Ibid.

<sup>176</sup> Journal Officiel de la République Française, Lois et Décrets, March 20, 1962.





Algeria proclaimed the total nationalization of foreign-owned agricultural estates,<sup>177</sup> but made no provision for compensation. During the first nationalization programme, implemented on May 2, 1963, and affecting large corporate estates of French citizens, France acquiesced in it, and agreed that part of its financial aid should be applied towards the compensation of those French investors - particularly the most recent ones - affected by the Algerian Government measure. But she was provoked by the second nationalization policy into adopting retaliatory action.<sup>178</sup>

On July 26, 1956, a presidential decree was issued in Egypt on the nationalization of the "Universal Suez Canal Company", with a guarantee to pay compensation "after the Nation has taken delivery of all the assets and properties of the nationalized company".<sup>179</sup> The Egyptian Government's Memorandum of March 28, 1957<sup>180</sup> announced Egypt's readiness to submit the matter of compensation and claims connected with the nationalization of the Company to arbitration, unless agreed between the parties in accordance with the

---

<sup>177</sup> Charpentier, "Pratique française du droit international: Algerie", 10 A.F.D.I. (1963) pp. 1021-1025.

<sup>178</sup> Ibid., pp. 1023-25.

<sup>179</sup> The Suez Canal, Facts and Documents 20 (1956); Whiteman, Digest, Vol. 8, p. 1106.

<sup>180</sup> Ibid., p. 1107.



established international practice".<sup>181</sup> France, the United Kingdom and the United States, in a Tripartite Statement of August 2, 1956,<sup>182</sup> while not questioning "the right of Egypt to enjoy and exercise all powers of a fully sovereign and independent nation, including the generally recognised right, under appropriate conditions, to nationalise assets not impressed with an international interest, which are subject to its political authority", protested the Egyptian Government's action. This subsequently led to the military conflict between France, Britain and Israel on the one hand, and Egypt on the other.

When Prime Minister Nyerere of Tanganyika announced the termination of the Belgian harbour concessions in 1961, at Kigoma and Dar-es-Salaam, he recognized the obligation to pay compensation.<sup>183</sup>

The Round Table Conference in Brussels of January, 1960, which led to the independence of Congo Kinshasa, incorporated a series of safeguards for the protection of concessionary rights of aliens in the Congo.<sup>184</sup> However, on December 3, 1964, the Congolese Government issued a decree on the "re-

---

<sup>181</sup> Ibid.

<sup>182</sup> Ibid., p. 1106.

<sup>183</sup> See the Prime Minister's Policy Statement in 11 I.C.L.Q. (1962) p. 1210 at p. 1213.

<sup>184</sup> Les dossiers du Centre de Recherche et d'Information Socio-Politique (Congo, 1960) Vol. 1, p. 92.



appropriation" of all mining concessions throughout the Congo. The Union Miniere de Haut-Katanga, together with the four Belgian-owned companies which had been granted land, mineral and forestry concessions, was directly affected. Nevertheless, the Government explained that the term "re-appropriation" did not mean nationalization, but under the new decree, all future mining companies would be required to buy their right to exploit the land from the government. The decree also guaranteed the protection of alien property rights.<sup>185</sup> The issue was finally settled in a general financial agreement concluded between the Congo and Belgium in January, 1965.<sup>186</sup>

Shortly before Zambia achieved independence in 1964, the United Kingdom Government suggested that property rights and fundamental freedoms be entrenched in the proposed independence constitution of Zambia.<sup>187</sup> However, the Northern Rhodesian (now Zambian) Government objected to the inclusion among such rights of the mineral rights of the British South Africa Company for the reason that the concessions obtained by that Company from the Northern Rhodesian chiefs in the 1890's did not include mineral rights in the Northern Rhodesian copperbelt; moreover, the Company was

---

<sup>185</sup> The Times, London, December 3, 1964, p. 8.

<sup>186</sup> The New York Times, February 8, 1965, p. 1.

<sup>187</sup> S.I. 1964, No. 1652.





alleged to have indulged in exploitative excesses throughout its history in Northern Rhodesia.<sup>188</sup> The representatives of Zambia then stated that should the Company's concessionary rights be entrenched in the Zambian Constitution, the Government of Zambia would, after independence, seek by referendum a change of the Constitution to enable them to expropriate the Company's enterprise.<sup>189</sup> The Government of Zambia argued that the position which the United Kingdom sought to give the British South Africa Company in the Zambian Constitution was an attempt to substitute the Company for the Zambian people as the ultimate owners of the country's natural resources. However, an agreement was finally reached on the eve of Zambia's independence in negotiations in which the United Kingdom Government, the British South Africa Company and the Government of Zambia participated. The sum of four million pounds sterling was paid to the Company by both the United Kingdom and Zambian Governments (each contributing 2 million pounds) in compensation for terminating its mining concessions.<sup>190</sup>

This inquiry into the available practice of the new States in respect of succession to concessionary contracts points up the somewhat chequered career of some of the con-

---

<sup>188</sup> The Times, London, September 21, 1964, p. 13.

<sup>189</sup> Ibid., September 30, 1964, p. 12.

<sup>190</sup> 10 Commonwealth Survey (1964) p. 1131.



cessions in the brief history of these new States. That said, it is important, however, to emphasize that the great majority of the new States appear to have continued to honour the concessions granted to private foreign companies by their predecessors. It is also significant to note that no new State appears to have contended that the concessionary rights of aliens automatically lapse in virtue of State succession. Nevertheless, it is difficult to assert that any new principle of international law concerning this specific aspect of State succession has as yet crystallized. Even though many of the newly independent States have refrained from embarking on rash actions detrimental to foreign concessionary interests, the argument is frequently heard that the successor State need not respect odious concessions, or concessions granted by the predecessor in bad faith, or those directly contrary to its public policy.<sup>191</sup>

Many of the new States are committed not only to broad programmes of economic development, but also to a policy aimed at asserting national control over the natural resources within their territory. As regards the second objective, these States, having regard to their "subser-

---

<sup>191</sup> Robert Delson, "Comments on State Succession", Proceedings, A.S.I.L. (1966) p. 114; Zemanek in 116 Hague Recueil (1965 III) p. 288; Friedmann, "The Uses of 'General Principles' in the Development of International Law", 57 A.J.I.L. (1963) pp. 297-98; Hyde, International Law (2nd rev. ed., 1947) p. 429; O'Connell, The Law of State Succession (1956) pp. 130-31.



vient status" within the international economic system, appear to draw inspiration from a number of United Nations resolutions. For instance, General Assembly Resolution 626 (VII) of 21 December, 1952<sup>192</sup> recommended

all Member States, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations;... all Member States... (should) refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources.

Paragraph 4 of the General Assembly Resolution of December 14, 1962 on Permanent Sovereignty over Natural Resources<sup>193</sup> provided that

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

However, it would appear that the problem of State succession is excluded from the operation of this paragraph, although it could be argued that the paragraph is capable of influencing the future economic policy of a new State seeking to exercise control over its natural resources which may at

---

<sup>192</sup> GAOR., 7th sess., 411th plenary Mtg., December 21, 1952, p. 495.

<sup>193</sup> G.A. Res. 1803 (XVII).





present be controlled and exploited by foreign companies. Despite these General Assembly resolutions, the fact, however, is that many of the new States, by the logic of their commitment to a policy of economic development, have accepted and are still accepting foreign capital investment, even at the expense of their economic, and hence political, independence. Although it is argued that nationalization or expropriation is possible provided prompt and adequate compensation is paid, in reality only few new States, under existing conditions, are willing to risk the interruption or discontinuation of the flow of foreign capital into their economies. Furthermore, the vast majority of the new States are in no position to pay "prompt and adequate" compensation to expropriated foreign companies. The upshot of the present situation is that the law of State succession with respect to concessionary contracts remains undefined and subject to continuing political debate and controversy between States.



## CHAPTER VIII

### CONCLUSION

The birth of the new States of Asia and Africa and their admission into the world community of States, the rapid expansion of the field of international relations and the consequent participation of these States in the activity of an ever-growing number of international organizations have led to their intensified insistence not merely on a review of some of the traditional rules of international law, with a view adapting them to the changing structure of the international society, but also on the adoption of new rules which will ensure a greater measure of social justice. As a result of their concern with the modification of traditional international law together with the desire to take part in the creation of new norms, as a mode of expressing their consent to be bound by such norms, the question of treaty law has become one of paramount importance, since States regard international treaties and agreements as the prime source of the rules of international law. But even of greater significance is the question of the succession of the new States to the treaty obligations of their predecessors. The fundamental objective of this study was, therefore, to analyze and assess the present status of the law of State succession, as well as of the practice of the



new States, to determine the extent to which that law has been affected by the impact of new developments in international life.

But the overlapping nature of all aspects of international relations and the complexities of the modern world itself make it imperative that the international law of State succession must not be studied in isolation, but rather in the wider context of international politics since national interests have often tended to exert profound influence on the attitude of States to problems of international law in general. Furthermore, the fact that States still remain the ultimate creators and executors of international law implies that, in the absence of an independent international authority with the competence to declare and enforce the applicable law, the law of State succession, like any other aspect of international law, remains open more or less to the subjective appraisal and interpretation of individual States. But this does not mean that, in the last analysis, the determination of the validity or invalidity of a given State's interpretation of an international legal rule - or indeed of the legality or illegality of its conduct under international law - rests exclusively with the State. For it is the international society as a whole, or an international tribunal specifically empowered for that purpose, that may decide what the valid or binding rules are. To this extent, generally





accepted principles of international law become useful as a practical guide.

As an essential background to the proper understanding of the attitude of the new States towards succession to international treaties, Chapter I was devoted to an examination of the practical role of the new States in international law and relations. We noted the widespread dissatisfaction of the new States with the 'inadequacies' of some of the traditional rules of international law. Their negative reaction takes the form of appeals to the consensual theory of international law as a basis of binding obligations. But underlying their entire approach to legal problems is their singular concern for the security of their independence. This is manifested in their pre-occupation with questions of decolonization and self-determination; the desire for the maintenance of independent political and economic systems; their search for justice in international relations, and their commitment to the principle of sovereign equality of States. Associated with this is the repeated attack levelled at "unequal treaties" as both the source and the end-result of political subjugation. Thus they have constantly affirmed their determination, perhaps with the aid of the United Nations, to rid themselves of the crippling obligations imposed by such treaties. Through their participation in the United Nations, a concerted attempt has been made to promote new legal norms



aimed at proscribing the use of force against the 'political, economic and cultural' integrity of the State.<sup>1</sup> As weak and underdeveloped States, they have given massive support to United Nations resolutions calculated to ensure their eventual control of their natural wealth and resources. Thus the new States were inclined to equate Resolution 1803 (XVII) of December 14, 1962, on Permanent Sovereignty over Natural Resources with an international declaration of the "economic independence of States".<sup>2</sup> In the political realm, not only has the principle of self-determination been asserted to constitute an entirely new juridical norm binding upon all States, but the concept of peaceful co-existence subsumed under the general rubric of the "Principles of Friendly Relations and Co-operation among States" has been proposed as one of the new principles of general international law,<sup>3</sup> which imposes a duty upon States to co-operate in their international relations in accordance with the Charter of the United Nations.

One of the distinctive features of the reformist attitude of the new States towards traditional international law is the clear ambivalence with regard to the character

---

<sup>1</sup> See above pp. 19, 101 et. seq.

<sup>2</sup> See above p. 48 et. seq.

<sup>3</sup> Green, "The Impact of the New States on International Law", 4 Israel Law Review (1969) p. 48.



of the norms invoked under specific circumstances. While they may adhere tenaciously to such orthodox principles as State sovereignty and the inviolability of the territorial integrity of the State, it is not uncommon to evoke with equal fervour the "new norm" of self-determination of peoples as a justification for the support of national liberation movements directed towards the overthrow of oppressive regimes, particularly those of a colonial character.<sup>4</sup> It becomes immaterial whether the activities of such movements amount to a violation of the territorial integrity, or interference in the domestic affairs, of other States. From the point of view of human rights, it is claimed, despotic domestic policies of States constitute a threat to international peace and security, and hence are a matter of profound international concern. The paradox inherent in the situation seems to be that each State arrogates to itself the right to determine for another what are human rights. This in itself would appear to be contrary to positive international law, since one State cannot unilaterally claim the right to impose its own interpretation of a rule of international law upon another; furthermore, the question of human rights is largely a matter of domestic of jurisdiction. The fundamental principle of the juridical

---

<sup>4</sup> Boutros-Ghali, "The Addis Ababa Charter", International Conciliation, No. 546 (1964) pp. 53-55.





equality of States is logically opposed to the placing of one State under the jurisdiction of another.

It has been emphasized that the critical attitude of the new States towards traditional international law derives partly from their historical experience as subject peoples and partly from their status as economically poor and militarily weak nations. Nonetheless, the new States' approach to questions of international law merits the criticism that, while it would appear legitimate for them to ask that some of the rules of traditional international law be revised in order to adapt them to the needs of the present-day international society, a systematic opposition to the existing law merely because it was created without their consent would hardly lead to a stable world order or promote any degree of peace and security in international relations. On the contrary, where established usages or existing principles have been deprived of any normative value without being replaced by adequate and broadly acceptable ones, relations between States are likely to be left in a state of chronic crisis, ending in ultimate disaster for the human race.

But if the current participation of the new States in international life is seen as having in some way brought about a modification in the conventional procedures or style of international relations, then this is probably a reflection of their deep concern for a change of emphasis in



respect of certain of the underlying principles and postulates of international law. International law, like municipal law, possesses some inherent power of growth. It is, therefore, not inconceivable that where, and if, contemporary practices with regard to such postulates become accepted by States, they may provide a foundation for the development of pertinent rules of international law, which in turn will condition the subsequent practice of States.

It is significant that, notwithstanding their criticism of some of the rules of traditional international law which they regard as detrimental to their interests, in actual practice, the new States have often allowed themselves to be guided even by such rules. The greatest value, then, of international law would seem to lie in the fact that it is more or less indispensable to peaceful international intercourse.

Attempt was made in Chapter II to analyze the theoretical foundations of the law of State succession, with particular attention to the relevant theoretical pronouncements of the new States. This raised a number of delicate doctrinal questions which lend themselves to a variety of interpretations, but which indeed can hardly admit of a single definitive solution. Historically, the theory of State succession has always been the battle-ground for conflicting doctrinal positions among legal scholars, who sometimes propound their theoretical convictions with ideological overtones.



It has been said that in the field of international law facts are more important than abstract legal theories. Yet it would be futile to deny that, to explain the reality of the present world order, it may well be worthwhile to attempt to systematize all the relevant factors which bear directly on the orderly functioning of that system. As it was noted, however, a general rule of State succession is not acknowledged in international law.<sup>5</sup> Moreover, evidence of State practice and international jurisprudence is very difficult to evaluate. More often than not, State conduct is guided by the overriding considerations of policy, leaving the certainty or predictability of the law at the mercy of amorphous political criteria. To this extent, legal principles become functional only as ex post facto rationalizations of State policy. Judicial decisions, on the other hand, are often concerned with narrow questions, and do not provide a suitable basis for doctrinal constructions or broader generalizations.<sup>6</sup> Thus, while specific legal

---

<sup>5</sup> Oppenheim, International Law, Vol. 1 (8th ed., Lauterpacht, 1955) p. 158; Schwarzenberger, International Law, Vol. 1 (1957) p. 179; A Manual of International Law (5th ed., 1967) p. 88; Marek, Identity and Continuity of States in Public International Law (1968) p. 10; O'Connell, The Law of State Succession (1956) p. 7.

<sup>6</sup> Even in the oft-cited case of German Settlers in Poland (P.C.I.J., Ser. B, No. 6 (1923)) p. 36 where the Permanent Court stated: "Private rights acquired under existing law do not cease on a change of sovereignty.... It can hardly be maintained that, although the law survives, private rights acquired under it have (continued on page 487)"





principles may be applied to the determination of cases of a particular or restrictive character, international tribunals - or, for that matter, national courts - have given no judicial approval, beyond what may be required by the particular circumstances, to sweeping generalizations in the sphere of State succession, which may be regarded as immutable standard for the future conduct of States.

In view of this, the neo-universal succession theory advanced by a small but formidable group of jurists<sup>7</sup> not only lacks the support of judicial authority, but it flies in the face of international practice. Briefly, the theory postulates a general succession whereby all treaties would devolve ipso jure upon a new State; the new State may then exercise the right of denunciation if the treaty obligations are subsequently found to be contrary to its basic interests.

---

6 (continued)

perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice". First, this implies that private rights may cease if the law of the territory is changed. Second, the Court was dealing with an obligation which Poland had under a special treaty, signed at Versailles on June 28, 1919; it was with reference to this particular treaty that the Permanent Court of International Justice held that Poland was obliged to respect the rights in question. Thus, with regard even to private rights, the fundamental question relates to the circumstances under which a State may modify or cancel such rights by virtue of its sovereign legislative power.

<sup>7</sup> E.g., D.P. O'Connell, State Succession in Municipal Law and International Law, 2 Vols. (1967); La Forest, "Towards a Reformulation of the Law of State Succession", Proceedings, A.S.I.L. (1966) p. 103; Jenks, "State Succession in Respect of Law-Making Treaties", 29 B.Y.I.L. (1952) p. 105; The Common Law of Mankind (1958) p. 94.



The essential objective of this theory is to maintain the continuity of legal relationships without a destabilizing reapture of the existing legal structure. Sometimes, the exponents of this theory argue also that the treaty obligations of the predecessors should devolve automatically upon the newly independent States partly because some of the treaties were concluded with third States by the local governments of the territories when they were still dependent. Furthermore, it is contended that not only were some of the treaties concluded by the colonial masters as agents of the territories for whose international relations they were responsible, but that certain of the treaties were specifically extended to the colonial territories by means of territorial application clauses; consequently, the new States must be presumed to continue to be bound by such treaties.

The problem raised by this proposition is by no means easy. First, even if it were accepted that all newly created States must succeed automatically to the treaty rights and obligations of their predecessors and then should denounce afterwards all those treaties which they find to be incompatible with their new status as sovereign States, the attempted institutionalization of the controversial principle, rebus sic statibus, would inevitably lead to the perennial instability of treaty relations. Thus the basic purpose of the universal succession theory would be defeated



by its internal logic. Secondly, although according to international law the power formerly exercising sovereignty over the territory of the new State always represented the territory and population, it is clear that in many cases it was not possible to distinguish between the interests of the population of the dependent territory and those of the metropolitan power, more particularly, as the people were in no position to influence the policy of the colonial authorities. This is admittedly a political argument. But it seems significant in so far as the problem of contractual engagements depending as it is largely upon the autonomy of the parties' wills, is concerned. Furthermore, the notion of agency with regard to the conclusion of international treaties is admissible only in case of protectorates where the colonial authority was supposed to be acting in a representational capacity as the protector under treaty of the dependent territory in question. France, for instance, acted in this capacity with respect to Morocco, Tunisia, Cambodia and Thailand. But, if on the other hand, a State is alleged to possess international capacity as an independent entity, there is no reason why such a State should not exercise the correlative right of entering into independent contractual relations on the international plane, without having to do so through the agency of another State.

There is also the question of the nature of the treaties involved. Even if a new State were willing to maintain







existing treaty relations with third States, what would happen to the old treaties, or certain provisions of such treaties, which are manifestly inconsistent with the political status of the new State? If the new States were to be subrogated ipso jure in the treaty rights and obligations of their predecessors, would they not have completely thereby mortgaged their contractual capacity which is of the essence of an independent State? These are the unavoidable questions - questions of crucial political significance - which the proposition of universal succession automatically raises. And international practice indicates that most States are reluctant to succeed automatically, unless otherwise provided under treaty, to the treaty rights and duties of their predecessors. On the other hand, they prefer to retain a certain measure of political discretion as to the type of treaties to which they are willing to acknowledge succession. In any event, the new States of Asia and Africa have not all adopted the same solution to the problem of succession to international treaties and other agreements. Examination of specific instances, as shown in Chapters IV, V and VI above, discloses enormous inconsistencies in their practice. There appears to be widespread agreement, however, that the old principles of international law cannot be applied at least in their entirety to the present situation. This theme is well brought out in the various debates in the United Nations and in the Legal Committee and the



International Law Commission of the United Nations.<sup>8</sup>

Similarly, the tabula rasa doctrine appears to be largely an exercise in intellectual gymnastics, for this theory is little rooted in realism. According to it, a newly created State starts life with a clean slate in respect of the treaty obligations of its predecessor, except in so far as such obligations may be of a purely local character. Some would go so far as to argue that even localized obligations must be assimilated to the category of personal treaties which are liable to be rendered invalid by the fact of the birth of the new State.<sup>9</sup> The aim of this theory is therefore to free the new State from the contractual obligations of the former sovereign, so that in seeking to enter into treaty relations with foreign States its autonomy of sovereign will may be preserved and freely expressed. It is further suggested that in fact in the case of the former colonial territories, the colonial Power did not act in the name of the population, but by virtue of its superior position as the governing authority. Hence the effects of any previous treaties ceased with the termination of that authority.

While this theory is capable of appealing intensely to

---

<sup>8</sup> See, e.g., I.L.C. Yearbooks, 1957, 1959, 1963.

<sup>9</sup> See, e.g., E. Castren, "On State Succession in Theory and Practice", 24 Nordisk Tidsskrift (1954) p. 55; Lester in 12 I.C.L.Q. (1963) p. 475; Esgain, in O'Brien, The New Nations in Int. Law and Diplomacy (1965) p. 42.



the nationalist sentiments of the new States who are probably anxious to 'eliminate all remnants of colonialism', such a theory, if implemented in its absolute form, would be productive of radical chaos in international relations. First, the new State itself would remain, at least for some time, if not in total isolation, legally incapacitated with respect to the external aspects of its policy; it would be difficult for it to play any role of significance in the world vis-a-vis other States. Certainly a serious legal vacuum would be created by an indiscriminate abrogation of all previous treaty relationships by a new State, for third States adversely affected by such action might be compelled to retaliate. However, the wholesale adoption of such a policy is rendered impracticable and improbable by the very interdependence of States in the modern world.

It seems nearer the truth to say that whenever a new State is created, there is a certain measure of succession to the rights and obligations of the predecessor State.<sup>10</sup> While a new State may be reluctant to assume those treaty obligations which are not in conformity with its basic interests, or with the essential object of its independence, subrogation to certain other rights and obligations under treaties concluded on its behalf by the predecessor may well prove indispensable not only to the progressive development

---

<sup>10</sup> Green in 38 B.Y.I.L. (1962) p. 457 at p. 466.





of its domestic economy, but to its very participation in international life. In general, the practice has been to accept the position created by the commercial and administrative treaties and conventions of the predecessor until such a time that the individual treaties are terminated or amended. To this extent, multilateral conventions of an economic, humanitarian and technical character are almost always accepted by the new State as continuing in force. Thus, for the purposes of theoretical construction, it would appear that, since the attitude of governments is of enormous significance in the formulation of rules of international law, any theory of State succession which aims at providing a basis for the development of acceptable legal rules must be tailored as far as practicable to the inexorable facts of international practice, for international relations are inescapably a process of balancing out the conflicting interests of nations. A theory of State succession so adapted, rather than sharpen and make more implacable the conflict between national entities, may possess the practical value of eliminating extensive opposition to the law of State succession from States, thereby affording guiding principles for State action and jurisprudential activity.

Succession to multilateral treaties, particularly those of which the Secretary-General of the United Nations is the depositary, has been utilized by the new States as the springboard to international activity. Although succession



to all such treaties has not been acknowledged by all the new States, the great majority of them have been accepted as binding. Nearly all the new States have been favourably responsive to the unremitting pressure exerted by such specialized agencies of the United Nations as the International Labour Organization whose conventions are considered vital to the protection and advancement of human rights. The Secretary-General of the United Nations, while showing constructive initiative in encouraging new States, particularly those parties to devolution agreements, to declare their attitude to important international instruments of which he is depositary, has frequently acted in deference to the wishes of the new State concerned, mainly from considerations of respect for the sovereignty of the new State. This, in effect, has posed drastic problems of policy for the Secretariat in terms of developing a consistent and predictable principle of action with respect to the continued applicability of crucial international conventions to the territories of the newly independent States. The need for ascertainment of the disposition of a new State towards such international conventions, most of which are of a social and humanitarian character, necessarily prompts the approach of dealing with a given new State on an ad hoc basis. Consequently, it is difficult to see how, even where a convention contains a territorial application clause, a new State could be said to be listed against such an instru-



ment if the continued application of the instrument were made essentially dependent on the express acceptance of the State. When all is said and done, it is necessary, however, to appreciate the immense difficulty which differences in the nature of the respective conventions and the conditions stipulated by their provisions might pose to any effort to make them automatically binding on a new State.

Apart from the few anomalies which are discernible in the practice of the United Nations regarding succession to membership in the Organization,<sup>11</sup> the general legal position still prevails that there is no succession to membership in the United Nations. A new State must therefore apply for admission to membership in accordance with the provisions of the Charter. This principle which was firmly established and applied in relation to the admission of Pakistan in 1947<sup>12</sup> had unfortunately been subordinated to political expediency in the instance of the United Arab Republic after the union of Egypt and Syria; this laxity was equally evident in the continued membership of Tanganyika after the creation of the United Republic of Tanzania, and more so when Indonesia, after having voluntarily withdrawn from the Organization, resumed its seat a few years later with little or no discussion. The leaving of such crucial decisions as

---

<sup>11</sup> See above p. 302.

<sup>12</sup> See above p. 282 et. seq.





those affecting the admission of States, to the administrative organ of the United Nations may have been prompted at the time by the exigencies of the international situation. But what needs to be stressed is that the assignment of priority to political factors over accepted legal procedures is hardly likely to prove wholesome for a world organization in which mankind has reposed so much faith.<sup>13</sup>

As regards the problem of succession to other international institutions, the study has revealed the development of no consistent rule or uniform principle guiding the practice of all such institutions. In general each has tended to be guided by the construction of its constitutional provisions, and more specifically by its conception of its overall objectives. Thus, while the I.L.O. insists on admission of new States by way of succession upon independence,<sup>14</sup> the I.T.U., for instance, requires that all new States apply for admission de novo.<sup>15</sup> On the other hand, there are other organizations which, even though their constitutions do not explicitly provide for succession upon independence, have tended to admit succession upon independence. The African Postal and Telecommunications Union has

---

<sup>13</sup> See above p. 297.

<sup>14</sup> See above p. 224.

<sup>15</sup> See above p. 321 et. seq.



followed this practice.<sup>16</sup>

The practice of the new States in this regard has also remained inconsistent. Some, such as Pakistan, have claimed automatic succession to membership in certain international institutions, even where no constitutional provision has been made for it; others have declined succession, arguing that as newly independent States they must retain the freedom to enter into treaty relations in accordance with their wishes. Frequently such States have chosen to file new instruments of adhesion, accession or ratification as a means of expressing their "independent sovereign will". Yet, the majority of the new States have clearly avoided repudiation of membership in these international organizations. Their realization of the wider community interest served by such organizations and their desire to play a part in the shaping of contemporary international life have largely accounted for their positive support for the maintenance of the legal regimes created by the organization. Through their participation in the activity of these organizations, the new States hope to impart a truly universal character to the legal norms which have developed and crystallized from the practice of the international organizations.

Many of the international organizations, sensitive to these States' psychology of newly-won independence, have

---

<sup>16</sup> See above p. 305.



responded by adopting a somewhat flexible policy to facilitate admission of the new States to membership. This is demonstrated by the willingness of such organizations as the GATT, where succession is constitutionally provided for, to respect the intention of the new States.<sup>17</sup> Thus they do not insist upon automatic succession. This means that the new State is still given the right of option as to whether or not it wishes to succeed. This rather flexible attitude on the part of the organization, coupled with the new States' awareness of its vital contribution to beneficial international economic co-operation, has made it possible for them more readily to acknowledge succession or accession to membership.

The effect of change of sovereignty on dispositive or "localized" obligations is traditionally viewed as posing little or no problem to State succession, since treaties creating real rights, such as boundary treaties and treaties establishing servitudes, are held to continue to bind the territory they impress. The new States have by and large accepted the position created by their predecessors as binding, particularly with regard to boundary treaties. Yet it is also true that some of them have openly challenged the validity of inherited territorial frontiers, calling for a

---

<sup>17</sup> T. Kunugi, "State Succession in the Framework of GATT", 59 A.J.I.L. (1965) p. 285.





revision or renegotiation of the treaties which fixed the disputed frontiers. Often such a challenge has led to military clashes between the new States concerned. This was the case, as pointed out in Chapter VI, with Ethiopia and Somalia,<sup>18</sup> Algeria and Morocco,<sup>19</sup> and India and China.<sup>20</sup> It was also the case when Afghanistan challenged Pakistan's claim to have succeeded to the Anglo-Afghan Treaty of 1921 which recognized the Durand Line laid down in the Treaty of 1893.<sup>21</sup> It is, however, significant to note that in almost all these cases a settlement has been effected between the contending parties by diplomatic or conciliatory procedures resulting in no fundamental change in the original boundary alignments.

But localized obligations of the character of a servitude have posed more titanic problems where the newly independent States are concerned. Although there are not many instances of treaties that have created permanent servitudes within the territories of these States, the very implications of the concept are sufficient to arouse violent political emotions in a new State. Its experience as a former colonial territory is too fresh to permit it

---

<sup>18</sup> See above p. 383.

<sup>19</sup> See above p. 395.

<sup>20</sup> See above p. 387.

<sup>21</sup> See above p. 433.



to tolerate subjecting its territory again to the permanent service of the interests of foreign States. Thus we noted that Tanganyika (now Tanzania)<sup>22</sup> was moved by this kind of feeling to refuse succession in 1961 to the Anglo-Belgian Treaties of 1921 and 1951 respectively, creating permanent territorial settlements in Tanganyika in favour of Belgium. The Sudanese Republic was prompted by similar sentiments to call for a renegotiation of the Anglo-Egyptian Agreement of 1929.<sup>23</sup> A new agreement was concluded in 1959 between Sudan and Egypt, thus removing what Sudan regarded as the inequities inherent in the 1929 Agreement. Yet one cannot say that these isolated developments necessarily represent the singular determination on the part of every new State to rid itself of any treaty obligations of this character with which its territory might currently be burdened. We had occasion to note that there are indeed some of the new States, such as Malagasy under the Franco-Malagasy Accord of 1960, who have gracefully accepted the creation of military servitudes within their territory.<sup>24</sup> This then makes it exceedingly difficult to abstract any general principle on the basis of which either the current or future behaviour of the new States with respect to this category of treaties

---

<sup>22</sup> See above p. 357 et. seq.

<sup>23</sup> See above p. 363 et. seq.

<sup>24</sup> See above p. 349.



can be rationally explained. Nevertheless, what seems certain is that boundary treaties are most likely to continue to be acknowledged by the new States as having effected a final settlement in the form of a conveyance which then becomes automatically binding on every succeeding State.

Succession to bilateral treaties may take place by a process of express or tacit novation. But in no case is it a unilateral act. Thus even a devolution agreement cannot operate to bring about a novation unless the third State expressly or tacitly consents to the novation.<sup>25</sup> The practice of the new States, as shown in Chapter VII, indicates that they are far more cautious about making declarations of continuity of bilateral treaties. This attitude may be explained either by reference to the strictly technical problem of having access to all applicable bilateral treaties, or to the general inclination of States to regard succession to bilateral treaties as a matter to be determined exclusively by considerations of policy. There are very limited materials on the practice of the new States in this regard. It is therefore difficult to generalize. But, having regard to the political and economic conditions of most of the new

---

<sup>25</sup> McNair, Law of Treaties (1961) p. 650; E. Lauterpacht in 7 I.C.L.Q. (1958) p. 524; Fawcett, The British Commonwealth in International Law (1963) p. 220; Zemanek, "State Succession after Decolonisation", 116 Hague Recueil (1965) p. 187.





States, it is possible to state, however tentatively, that these States are not likely to repudiate even all the treaties that are of a political character. Nevertheless some, such as the Central African Republic, have asserted quite categorically that treaties which are incompatible with their new status as sovereign States will be considered as having terminated by reason of changed circumstances.<sup>26</sup> The temporizing policy adopted by Tanzania, Uganda, Malawi and Zambia also amounted, in effect, to this. Others, such as the former French African colonies, who found it necessary to admit succession to all relevant French treaties at the beginning of their independence, have made extensive reservations regarding their possible future attitude to some of the treaties. Senegal<sup>27</sup> and the Malagasy Republic<sup>28</sup> are cases in point. But as shown by the report of the Sub-Committee on Succession of States and Governments of the International Law Commission of the United Nations, the new States prefer, in principle, to emphasize discontinuity rather than continuity of previous treaty obligations.<sup>29</sup> They maintain that the phenomenon of

---

<sup>26</sup> See above p. 211 et. seq.

<sup>27</sup> See above p. 210

<sup>28</sup> See above p. 421

<sup>29</sup> GAOR, 23rd sess., Suppl. No. 9 (A/7209/Rev. 1) of August, 1968, p. 26, para. 63.



decolonization creates a category of State succession that is fundamentally different from any other historical type of State succession; in their view, the birth of these new States is in reality "the return of an earlier sovereignty".<sup>30</sup>

Of critical importance to State succession is the question of protection of foreign investments and acquired rights. Controversy has raged more fiercely in this area than perhaps in any other area of State succession, for States appear to have taken rigid positions over this particular issue. Because of the equities arising from the situation of "acquired rights", it is generally maintained that the private rights of aliens must be respected by the successor State, particularly if the municipal law of the predecessor State survives.<sup>31</sup> The respect of such rights does not, however, imply a duty on the part of the successor State to preserve them. By virtue of the supreme legislative power of the successor State, it remains competent to cancel, abrogate or modify such rights. But in the event of such action, the successor State is obliged under international law to provide a certain measure of compensation to the injured party.<sup>32</sup> Thus nationalization or

---

<sup>30</sup> Ibid.

<sup>31</sup> Cf. German Settlers case (1923) P.C.I.J., Ser. B., No. 6, p. 36.

<sup>32</sup> See above p. 450 et. seq.



expropriation of alien property is unlawful only if no provision is made for the payment of compensation.

The contention, therefore, that a successor State is subrogated ipso jure in the concessionary contracts of its predecessor is seriously disputed in international law.<sup>33</sup> If a new State were so subrogated, it would be denied the necessary rights incident to its status as a sovereign State, for it would thereby lack or surrender the discretion to adopt such economic policies as are appropriate to its conception of national development. International law imposes no obligation upon a successor State to carry on with economic arrangements made by its predecessor which may be either contrary to its public policy or limitative of the realization of its own ideas of economic and social development. It is generally admitted that a change of sovereignty may bring about a radical overhaul of the socio-economic structure of a State. To this extent, existing concessionary rights may be modified to bring them into conformity with the new economic conditions. So long as the legitimate interests of the concessionaire are given the necessary protection, as pointed out earlier, the successor State remains free to pursue those economic policies dictated by the require-

---

<sup>33</sup> C.C. Hyde, International Law, Vol. 1 (2nd rev. ed., 1947) p. 429; O'Connell, The Law of State Succession (1956) p. 130.





ments of public interest and its peculiar economic conditions. But, in the ultimate analysis, it is open to the new State either to permit existing concessions and acquired rights to continue unimpaired by the change of sovereignty and to adapt them to any modifications which might occur in the domestic law of the territory, or to offer compensation to those aliens whose rights may be adversely affected by the successor State's subsequent legislative act. However, for such rights to receive the protection of international law they must not only have been properly acquired under the municipal law of the predecessor State, but they must be fundamentally of a non-political character.

The cardinal problem arising from the expropriation or nationalization of alien property is that touching upon the notion of State responsibility. There is considerable controversy between the capital-exporting States and the new States (who are mostly capital-importers) as to whether the foreigners whose property rights have been affected by the nationalizing or expropriating measures of a successor State should be treated in accordance with the "minimum standard of international justice" or in accordance with the "national standards principle".<sup>34</sup> While the former group of States have insisted that the principle of international justice requiring adequate and effective compensation is

---

<sup>34</sup> See above p. 455.



invariably applicable in such cases, the new States have vigorously advocated the treatment of injured aliens on a footing of "perfect equality" with the nationals of the expropriating State.

Judged by the International Law Commission debate on the law of State responsibility, an immediate end to this controversy does not seem to be in sight. The conflicting positions taken by the various countries are very firmly held. But as was pointed out in Chapters I and VII of this study, the "principle of nationalization or expropriation" is only of potential significance to the new States. So far only very few of them - Indonesia, Morocco, Algeria and Tunisia, for instance - have undertaken any large-scale nationalization programmes.<sup>35</sup> Yet, even in the cases of Morocco, Algeria and Tunisia, the scheme was confined to a limited sector of the national economy. The act was based ostensibly on a policy of agrarian reform, fully recognized and sanctioned under the terms of the Independence Accords concluded between the predecessor State (France) and the new States involved. Beside the objective obstacle to extensive nationalization or expropriation of foreign property on the part of the new States, there is a logical conflict in their economic philosophy. The obstacle has to do with the debilitating lack of capital and techni-

---

<sup>35</sup> See above p. 466 et. seq.



cal know-how as well as their general condition of technological underdevelopment. The philosophical conflict arises from the basic antagonism between their commitment to intensive and extensive economic development with the eventual aim of assuming full control over their natural wealth and resources, and their almost total dependence upon the capital-exporting countries not only for massive capital investment but also for the requisite technical skills.

Thus, the need for rapid social and economic advance has frequently led the new States to conclude new economic treaties with their former colonial masters, granting extensive concessions in order to induce them to invest more capital in the economy of the new States. Such treaties cannot by any stretch of the imagination be considered as "equal". If one were therefore to go by the general theoretical antipathy of the new States towards all categories of "unequal treaties" and the corresponding assertion that they are juridically void ab initio since their basic aim is to create and perpetuate inequality of relations between States, one should expect that such treaties would not have been concluded in the first place. Nonetheless, the existence of these economic treaties demonstrates the paradox and ambivalence inherent in the attitude of the new States towards certain problems of international law. It further indicates that the suspected





crisis consequent upon indiscriminate nationalization or expropriation measures, which the successor States may be prompted by the fact of change of sovereignty to take, may yet, at least in so far as the Afro-Asian States are concerned, remain a distant prospect. This, however, does not preclude the recognition of the pressing need for continued search for more equitable principles and rules of State succession best suited to the potential adjustment of conflicting interests between States, and the safeguarding of relative stability in international relations.



## BIBLIOGRAPHY

### BOOKS

- Agrawala, S.K., "State Succession and Protection of Human Rights" in Horizons of Freedom edited by Singhvi, L.M., New Delhi (1969).
- Amerasinghe, C.F., State Responsibility for Injuries to Aliens. Oxford (1967).
- Asamoah, O.Y., The Legal Significance of the Declarations of the General Assembly of the United Nations. The Hague (1966).
- Bowett, D.W., Self-Defence in International Law. Manchester (1958).
- Brierly, J.L., The Basis of Obligation in International Law, edited by H. Lauterpacht and C.H.M. Waldock. Oxford (1958).
- \_\_\_\_\_, The Law of Nations, 6th ed., edited by C.H.M. Waldock. Oxford (1963).
- \_\_\_\_\_, The Outlook for International Law. Oxford (1944).
- Briggs, H.W., The Law of Nations, 2nd ed., New York (1952).
- Brownlie, I., Principles of Public International Law. Oxford (1966).
- Calvo, C., Le Droit international: theorique et pratique, 6 Vols., 5th ed. Paris (1896).
- Cassirer, E., The Myth of the State, edited by C.W. Hendel. London (1946).
- Chen, T., International Law of Recognition, edited by L.C. Green. London (1951).
- Cheng, B., General Principles of Law as Applied by International Courts and Tribunals. London (1953).
- Corbett, P.E., Law in Diplomacy. Princeton (1959).
- Crandall, S.B., Treaties, Their Making and Enforcement, 2nd ed. Washington, D.C. (1961).



De Muralt, R.W.G., The Problem of State Succession with  
Regard to Treaties. The Hague (1954).

Detter, Ingrid, Essays on the Law of Treaties. Stockholm  
and London (1967).

De Visscher, C., Theory and Reality in Public International  
Law, translated by P.E. Corbett. Princeton (1957),  
rev. ed. (1968).

Eagleton, C., "The United Nations; a Legal Order?" in Law  
and Politics in the World Community, edited by G.A.  
Lipsky. Berkeley and Los Angeles (1953).

Esgain, A.J., "Military Servitudes and the New Nations" in  
The New Nations in International Law and Diplomacy,  
edited by W.V. O'Brien. New York and Washington, D.C.  
(1965).

Fawcett, J.E.S., The Inter-Se Doctrine of Commonwealth  
Relations. London (1958).

\_\_\_\_\_, "The New States and the United Nations" in  
The New Nations in International Law and Diplomacy,  
edited by W.V. O'Brien. New York and Washington (1965).

\_\_\_\_\_, The British Commonwealth in International  
Law. London (1963).

Feilchenfeld, E.H., Public Debts and State Succession. New  
York (1931).

Fenwick, C.G., International Law, 4th ed. New York (1965).

Friedmann, W., The Changing Structure of International Law.  
New York (1964).

\_\_\_\_\_, Law in a Changing Society. London (1959).

\_\_\_\_\_, Legal Theory, 5th ed. London (1967).

Gentili, A., De Legationibus Libri Tres. The Classics of  
International Law, translated by G.J. Laing. New  
York (1924).

Grotius, H., De Juri Belli ac Pacis. The Classics of  
International Law, edited by J.B. Scott. Oxford  
(1925).

Hackworth, G.H., Digest of International Law, 8 Vols.  
Washington, D.C. (1940-44).





- Hall, W.E., A Treatise on International Law, 8th ed., edited by Pearce Higgins. Oxford (1924).
- Hershey, A.S., The Essentials of International Public Law and Organization, 2nd ed. New York (1927).
- Hertslet, Sir E., Hertslet's Commercial Treaties, 31 Vols. London (1840-1925).
- \_\_\_\_\_, The Map of Africa by Treaty, 3 Vols. (3rd ed., 1967).
- Herz, J.H., Political Realism and Political Idealism. Chicago (1951).
- Higgins, R., The Development of International Law Through the Political Organs of the United Nations. London, Oxford University Press (1963).
- \_\_\_\_\_, Conflict of Interests. Pennsylvania (1965).
- Hill, Norman, Claims to Territory in International Law and Relations. New York, Oxford (1945).
- Hitler, A., Mein Kampf, translated by J. Murphy. London (1939).
- Holloway, K., Modern Trends in Treaty Law. London (1967).
- Hovet, T., Bloc Politics in the United Nations. Cambridge (U.S.A.) (1960).
- Huber, M., Die Staaten - Succession. Leipzig (1898).
- Hudson, M.O., International Legislation: A Collection of Texts of Multipartite International Instruments of General Interest, 8 Vols. Washington, D.C. (1931-49).
- Hyde, C.C., International Law Chiefly as Interpreted and Applied by the United States, 2 Vols. (2nd rev. ed., 1947).
- Jenks, C.W., The Common Law of Mankind. London (1958).
- Jennings, R.Y., The Acquisition of Territory in International Law. Manchester (1963).
- Jessup, P.C., A Modern Law of Nations. New York (1968).
- Kaplan, M.A., and Katzenbach, N. deB., The Political Foundations of International Law. New York (1961).



- Keith, A.B., Theory of State Succession, with Special Reference to English and Colonial Law. London (1907).
- Kelson, H., The Law of the United Nations. New York (1964).
- \_\_\_\_\_, Principles of International Law, 2nd ed., edited by R.W. Tucker. New York (1952).
- Kiatibian, S., Consequences juridiques des transformations territoriales des Etats sur les traites. (1892).
- Kunz, J.L., The Changing Law of Nations. Columbus, Ohio (1968).
- Lamb, A., "The China-India Border (The Origins of the Disputed Boundaries)". Chatham House Essays, Vol. 2, London (1964).
- Lariviere, L., Des consequences des transformations territoriales des Etats sur les traites anterieurs. (1892).
- Lauterpacht, H., Private Law Sources and Analogies of International Law. London (1927).
- \_\_\_\_\_, The Development of International Law by the International Court, rev. ed. London (1958).
- \_\_\_\_\_, Recognition in International Law. Cambridge (1947).
- Lissitzyn, O.J., "International Law in a Divided World". International Conciliation, No. 542 (1963).
- Marek, C., Identity and Continuity of States in Public International Law, 2nd ed. Geneva (1968).
- Masouye, C., Decolonisation, independance et droit d'auteur: Les nouveaux Etats et l'Union de Berne. Geneva (1962).
- McNair, Lord A., International Law Opinions, 3 Vols. Cambridge (1956).
- \_\_\_\_\_, The Law of Treaties. Oxford (1938).
- \_\_\_\_\_, The Law of Treaties. Oxford (1961).
- Modelska, G., A Theory of Foreign Policy. Princeton (1962).
- Morgenthau, H.J., "Political Limitations of the United Nations" in Law and Politics in the World Community, edited by G.A. Lipsky. Berkeley and Los Angeles (1953).



- \_\_\_\_\_, Politics Among Nations, 4th ed. New York (1967).
- Nicholas, H., The United Nations as a Political Institution, 3rd ed. London (1967).
- Nussbaum, A., A Concise History of the Law of Nations, rev. ed. New York (1954).
- Nys, E., Le Droit international, 2nd ed., 3 Vols. Brussels (1912).
- O'Connell, D.P., International Law, 2 Vols. London (1965).
- \_\_\_\_\_, The Law of State Succession. Cambridge (1956).
- \_\_\_\_\_, State Succession in Municipal Law and International Law, 2 Vols. Cambridge (1967).
- \_\_\_\_\_, "Independence and Problems of State Succession in The New Nations in International Law and Diplomacy", edited by W.V. O'Brien. New York and Washington, D.C. (1965).
- Oppenheim, L., International Law, A Treatise, Vol. 1, 8th ed., edited by H. Lauterpacht. London (1955).
- Peaslee, A.J., Constitutions of Nations, Vol. 1. The Hague (1965).
- \_\_\_\_\_, International Governmental Organizations: Constitutional Documents, 2 Vols. The Hague (1961).
- Pufendorf, S., De jure naturae et gentium libri octo, translated by C.H. and W.A. Oldfather. Oxford (1934).
- Reid, H.D., International Servitudes in Law and Practice. Chicago (1932).
- Reuter, P., International Institutions, translated by J.M. Chapman. London (1958).
- Roling, B.V.A., International Law in an Expanded World. Amsterdam (1960).
- Schwarzenberger, G., Power Politics, 3rd ed. London (1964).
- \_\_\_\_\_, A Manual of International Law, 5th ed. London (1967).
- \_\_\_\_\_, International Law, Vol. 1. London (1957).







- Sinha, S.P., New Nations and the Law of Nations. Leyden (1967).
- Sorensen, M. (ed.), Manual of Public International Law. London (1968).
- Stewart, R.B., Treaty Relations of the British Commonwealth. New York (1939).
- Stone, J., Aggression and World Order. London (1958).
- \_\_\_\_\_, Legal Controls of International Conflict. New York (1954).
- Thomas, A.J., and A. van W. Thomas, Non-Intervention: The Law and Its Import in the Americas. Dallas, Texas (1956).
- Thomas, T.O., The Right of Passage over Indian Territory. Leyden (1959).
- Vali, F.A., Servitudes of International Law: A Study of Rights in Foreign Territory, 2nd ed. London (1958).
- Vattel, E. de, Le Droit des gens, ou Principes de la loi naturelle, Vol. 3, translated by C.G. Fenwick. Washington, D.C. (1916).
- Westlake, J., International Law, Part I. Cambridge (1904); 2nd ed. (1910).
- Wheaton, H., Elements of International Law, 1st ed. (1836); 8th ed. by R.H. Dana. Boston (1866).
- White, G., Nationalization of Foreign Property. New York (1961).
- Whiteman, M.M., Digest of International Law, Washington, D.C., Vol. 2 (1963); Vol. 5 (1965); Vol. 8 (1967).
- Wilkinson, H.A., The American Doctrine of State Succession. Baltimore (1934).
- Wortley, B.A., Expropriation in Public International Law. Cambridge (1959).
- Wright, Q., A Study of War, 2 Vols. Chicago (1942), rev. ed. (1968).



## UNITED NATIONS PUBLICATIONS

United Nations Documents and Official Records of the Security Council, the General Assembly and the Specialized Organs.

Yearbook of the International Law Commission (1949-1968).

Studies by the Secretariat (a) Memorandum on the Succession of States in Relation to Membership in the United Nations (Doc. A/CN.4/149 and Add. 1) (b) Memorandum on the Succession of States in Relation to General Multilateral Treaties of which the Secretary General is the Depositary (Doc. A/CN.4/150).  
United Nations Legislative Series: Materials on State Succession (ST/LEG/SER.B/14) (U.N. Pub. Sales No. E/F.68.V.5).

## ARTICLES

Amerasinghe, C.F., "The Exhaustion of Procedural Remedies in the Same Court", 12 I.C.L.Q. (1963), 1285.

Anand, R.P., "The Role of the New Asian-African Countries in the Present International Legal Order", 56 A.J.I.L. (1962), 383.

\_\_\_\_\_, "Asian-African States and International Law", 15 I.C.L.Q. (1966), 55.

Aufricht, H., "State Succession under the Law and Practice of the International Monetary Fund", 11 I.C.L.Q. (1962), 154.

Baker, P.L., "The Doctrine of Legal Equality of States", 4 B.Y.I.L. (1923-24), 1.

Bastid, P., "Cours de droit international public", Les Cours de droit (1965-66) (Faculty of Law, Paris), 561.

Baty, T., "Division of States: Its Effects on Obligations", 9 Trans. Grotius Soc. (1923), 119.

\_\_\_\_\_, "The Obligations of Extinct States", 35 Yale L.J. (1926), 434.



- Bleicher, S.A., "The Legal Significance of Re-Citation of General Assembly Resolutions", 63 A.J.I.L. (1969), 444.
- Briggs, H.W., "Power Politics and International Organization", 39 A.J.I.L. (1945), 664.
- \_\_\_\_\_, "The Colombian-Peruvian Asylum Case and Proof of Customary International Law", 45 A.J.I.L. (1951), 728.
- Brown, D.J.L., "The Ethiopia-Somaliland Frontier Dispute", 5 I.C.L.Q. (1956), 245.
- \_\_\_\_\_, "Recent Developments in the Ethiopia-Somaliland Frontier Dispute", 10 I.C.L.Q. (1961), 167.
- Castaneda, J., "The Underdeveloped Nations and the Development of International Law", 15 International Organization (1961), 38.
- Carlston, K.S., "Nationalization: An Analytical Approach", 54 Northwestern University L. Review (1959), 402.
- Castren, E., "Aspect recents de la succession d'Etats", 78 Hague Recueil (1951), 385.
- \_\_\_\_\_, "Obligations of States arising from the Dismemberment of Another State", 13 Zeitschrift fur Auslandisches Recht und Volkerrecht (1951), 753.
- \_\_\_\_\_, "On State Succession in Practice and Theory", 24 Nordisk Tidsskrift (1954), 55.
- Cavaglieri, A., "Regles generales du droit de la paix", 26 Hague Recueil (1929), 315.
- \_\_\_\_\_, in 34 Annuaire de l'Institut de droit international. Session de Paris (1934).
- Cheng, B., "Justice and Equity in International Law", 8 Current Legal Problems (1955), 185.
- \_\_\_\_\_, "International Law in the United Nations", 8 Y.B.W.A. (1954), 171.
- Corbett, P.E., "The Consent of States and the Sources of the Law of Nations", 6 B.Y.I.L. (1925), 20.
- \_\_\_\_\_, "The Status of the British Commonwealth in International Law", 3 University of Toronto Law J. (1940), 348.





- Cotran, E., "Some Legal Aspects of the Formation of the United Arab Republic and the United Arab States", 8 I.C.L.Q. (1959), 346.
- \_\_\_\_\_, "Legal Problems arising out of the Formation of the Somali Republic", 12 I.C.L.Q. (1963), 1010.
- Crusen, G., "Les servitudes internationales", 22 Hague Recueil (1928), 5
- Delson, R., "Comments on State Succession", Proceedings, A.S.I.L. (1966), 111.
- Domke, M., "Foreign Nationalization", 55 A.J.I.L. (1961), 585.
- Drucker, A., "Compensation for Nationalized Property, the British Practice", 49 A.J.I.L. (1955), 477.
- Elias, T.O., "The Berlin Treaty and the River Niger Commission", 57 A.J.I.L. (1963), 873.
- Fachiri, A.P., "Expropriation and International Law", 6 B.Y.I.L. (1925), 159.
- Falk, R.A., "On the Quasi-Legislative Competence of the General Assembly", 60 A.J.I.L. (1966), 782.
- \_\_\_\_\_, "New States and the International Legal Order", 118 Hague Recueil (1966), 10.
- \_\_\_\_\_, "Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order", 8 Howard Law Journal (1962), 128.
- Fitzmaurice, G., "The Juridical Clauses of the Peace Treaties", 73 Hague Recueil (1948), ii, 259.
- \_\_\_\_\_, "General Principles of International Law", 92 Hague Recueil (1957), 5.
- \_\_\_\_\_, "The Definition of Aggression", 1 I.C.L.Q. (1952), 137.
- Friedheim, R.L., "The 'Satisfied' and the 'Dissatisfied' States", 18 World Politics (1965), 20.
- Friedmann, W., "The Changing Dimensions of International Law", 62 Columbia L.R. (1962), 1147.
- \_\_\_\_\_, "The Principle of Unjust Enrichment", 16 Canadian B.R. (1938), 243, 377.



- \_\_\_\_\_, "Use of 'General Principles' in the Development of International Law", 57 A.J.I.L. (1963), 279.
- Gautron, J.C., "Sur quelques aspects de la succession d'Etats au Senegal", Annuaire francais (1962), 836.
- Gonidec, P.F., "La Communaute", Public Law (incorporating The British Journal of Administrative Law) (1960), 177.
- Goodrich, L.M., "The Political Role of the Secretary-General", 16 International Organization (1962), 726.
- Green, L.C., "Armed Conflict, War and Self-Defence", 6 Archiv des Volkerrechts (1956-57), 387.
- \_\_\_\_\_, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity", 4 Canadian Y.I.L. (1966), 3.
- \_\_\_\_\_, "New States, Regionalism and International Law", 5 Canadian Y.I.L. (1967), 118.
- \_\_\_\_\_, "General Principles of Law and Human Rights", 8 Current Legal Problems (1955), 162.
- \_\_\_\_\_, "Legal Issues of the Eichmann Trial", 37 Tulane L. Rev. (1963), 641.
- \_\_\_\_\_, "The Maxim 'Nullum Crimen Sine Lege' and the Eichmann Trial", 38 B.Y.I.L. (1962), 457.
- \_\_\_\_\_, "Political Offences, War Crimes and Extradition", 11 I.C.L.Q. (1962), 329.
- \_\_\_\_\_, "The Nature of International Law", 14 University of Toronto L. Journal (1962), 176.
- \_\_\_\_\_, "Recent Practice in the Law of Extradition", 6 Current Legal Problems (1953), 274.
- \_\_\_\_\_, "The Dissolution of States and Membership of the United Nations" 32 Saskatchewan Law Review (1967), 93.
- \_\_\_\_\_, "The Impact of the New States on International Law", 4 Israel Law Review (1969), 27.
- \_\_\_\_\_, "The Right of Asylum in International Law", 3 Univ. of Malaya Law Review (1961), 223.
- Hershey, A.S., "The Succession of States, Universal and Partial; Powers, Rights and Duties of Succeeding States", 5 A.J.I.L. (1911), 285.



- Hoffman, S., "International Systems and International Law", 14 World Politics (1961), 205.
- Hyde, J.N., "Permanent Sovereignty over Natural Wealth and Resources", 50 A.J.I.L. (1956), 854.
- \_\_\_\_\_, "Economic Development Agreements", 105 Hague Recueil (1962), 271.
- Jenks, C.W., "State Succession in Respect of Law-Making Treaties", 29 B.Y.I.L. (1952), 105.
- Jennings, R.Y., "The Commonwealth and International Law", 30 B.Y.I.L. (1953), 320.
- \_\_\_\_\_, "The Progressive Development of International Law and Its Codification", 24 B.Y.I.L. (1947), 301.
- Jessup, P.C., "Diversity and Uniformity in the Law of Nations", 58 A.J.I.L. (1964), 341.
- Johnson, D.H.N., "The Effect of Resolutions of the General Assembly of the United Nations", 32 B.Y.I.L. (1955-56), 98.
- Jones, M., "State Succession in the Matter of Treaties", 24 B.Y.I.L. (1947), 360.
- Katzarov, K., "Validity of the Act of Nationalisation in International Law", 22 Modern Law Review (1959), 639.
- Keith, K.J., "Succession to Bilateral Treaties by Seceding States", 61 A.J.I.L. (1967), 521.
- \_\_\_\_\_, "State Succession to Treaties in the Commonwealth: Two Replies", 13 I.C.L.Q. (1964), 1441.
- Kopelmanas, L., "Custom as a Means of the Creation of International Law", 18 B.Y.I.L. (1937), 127.
- Korovin, E.A., "Soviet Treaties and International Law", 22 A.J.I.L. (1928), 753.
- Krenz, F.E., "Newly Independent States and the Problem of State Succession", 33 Nordisk Tidsskrift (1963), 97.
- Krylov, S.B., "Les Notions principales de droit des gens", 70 Hague Recueil (1941), 411.
- Kunugi, T., "State Succession in the Framework of GATT", 59 A.J.I.L. (1965), 268.





- Kunz, J.L., "Identity of States Under International Law", 49 A.J.I.L. (1955), 68.
- La Forest, G.V., "Towards a Reformulation of the Law of State Succession", Proceedings, A.S.I.L. (1966), 103.
- Lauterpacht, E., "State Succession and Agreements for the Inheritance of Treaties", 7 I.C.L.Q. (1958), 524.
- Lauterpacht, H., "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 B.Y.I.L. (1949), 48.
- \_\_\_\_\_, "Codification and Development of International Law", 49 A.J.I.L. (1955), 16.
- Lawford, H.J., "The Practice concerning Treaty Succession in the Commonwealth", 5 Canadian Y.I.L. (1967), 3.
- Lester, A.P., "State Succession to Treaties in the Commonwealth", 12 I.C.L.Q. (1963), 475.
- \_\_\_\_\_, "State Succession to Treaties in the Commonwealth: A Rejoinder", 14 I.C.L.Q. (1965), 262.
- Liang, Y., "Admission of the Indian States to the United Nations", 43 A.J.I.L. (1949), 134.
- \_\_\_\_\_, "The General Assembly and the Progressive Development of International Law", 42 A.J.I.L. (1948), 66.
- \_\_\_\_\_, "The Development and Codification of International Law", Yearbook of W. Affairs (1948), 237.
- Lissitzyn, O.J., "Treaties and Changed Circumstances (Rebus Sic Stantibus)", 61 A.J.I.L. (1967), 895.
- Mankiewicz, R.H., "Air Law Conventions and the New States", 29 Journal of Air Law and Commerce (1963), 52.
- \_\_\_\_\_, "Les Nouveaux Etats et les conventions de droit aerien", Annuaire francais (1961), 752.
- Mann, F.A., "The Assignability of Treaty Rights", 30 B.Y.I.L. (1953), 475.
- Marchand, D., "State Succession and Protection of Human Rights", 8 Journal of the International Commission of Jurists (1967), 36.
- McDougal, M.S., "International Law, Power and Policy", 82 Hague Recueil (1953), 137.



- McNair, A.D., "So-called State Servitudes", 6 B.Y.I.L. (1925), 121.
- Monier, J.P., "Succession d'Etat en matiere de responsabilite internationale", Annuaire francais (1962), 65.
- O'Connell, D.P., "Independence and Succession to Treaties", 38 B.Y.I.L. (1962), 84.
- \_\_\_\_\_, "State Succession and Problems of Treaty Interpretation", 58 A.J.I.L. (1964), 41.
- \_\_\_\_\_, "State Succession in the British Commonwealth since the Second World War", 26 B.Y.I.L. (1949), 454.
- \_\_\_\_\_, "Economic Concessions in the Law of State Succession", 27 B.Y.I.L. (1950), 93.
- \_\_\_\_\_, "Unjust Enrichment", 5 American Journal of Comparative Law (1956), 2.
- \_\_\_\_\_, "The Crown in the British Commonwealth", 6 I.C.L.Q. (1957), 103.
- \_\_\_\_\_, "State Succession and the Effect upon Treaties of Entry into a Composite Relationship", 39 B.Y.I.L. (1963), 54.
- Ogley, R., "Voting and Politics in the General Assembly", 2 International Relations (1961), 156, 183.
- Pal, R., "Future Role of the International Law Commission in the Changing World", 9 United Nations Review (1962), 31.
- Panhuys, H.F. van, "La succession de l'Indonesie aux accords internationaux conclus par les Pays-Bas avant l'indépendance de l'Indonesie", 2 Nederlands Tijdschrift voor Internationaal Recht (1955), 55.
- Potter, P.B., "The Doctrine of Servitudes in International Law", 9 A.J.I.L. (1915), 627.
- \_\_\_\_\_, "Bases and Effectiveness of International Law", 63 A.J.I.L. (1969), 270.
- Rao, K.K., "The Sino-Indian Boundary Question and International Law", 11 I.C.L.Q. (1962), 375.
- \_\_\_\_\_, "The Sino-Indian Boundary Question: A Study of Some Related Legal Issues", 3 Indian J. of International Law (1963), 151.



- Rosenne, S., "The Effect of Change of Sovereignty upon Municipal Law", 27 B.Y.I.L. (1950), 267.
- \_\_\_\_\_, "United Nations Treaty Practice", 81 Hague Recueil (1954), 278.
- \_\_\_\_\_, "Israel et les traites internationaux de la Palestine", 77 Journal du droit international (1950), 1140.
- Roy, S.N. Guha, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 55 A.J.I.L. (1961), 863.
- Rubin, A., "The Sino-Indian Border Dispute", 9 I.C.L.Q. (1960), 90.
- Schachter, O., "The Development of International Law Through the Legal Opinions of the United Nations", 25 B.Y.I.L. (1948), 91.
- Schwarzenberger, G., "The Standard of Civilisation in International Law", 8 Current Legal Problems (1955), 211.
- \_\_\_\_\_, "The Protection of British Property Abroad", 5 Current Legal Problems (1952), 295.
- \_\_\_\_\_, "The Impact of East-West Rift on International Law", 36 Trans. Grotius Soc. (1950), 229.
- Scott, F.R., "The End of Dominion Status", 38 A.J.I.L. (1944), 34.
- Sen, Sirdar D.K., "The Partition of India and Succession in International Law", 1 Indian Law Review (1947), 190.
- Sethi, L.R., "India in the Community of Nations", 14 Canadian B.R. (1936), 39.
- Shihata, I., "The Attitude of the New States Towards International Court of Justice", 19 International Organization (1965), 203.
- Silvanie, H., "Responsibility of States for Acts of Insurgent Governments", 33 A.J.I.L. (1939), 78.
- Sinha, S.P., "Perspectives of the Newly Independent States on the Binding Quality of International Law", 14 I.C.L.Q. (1965), 121.
- Sloan, F.B., "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", 25 B.Y.I.L. (1948), 1.







- Sohn, L.B., and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", 55 A.J.I.L. (1961), 545.
- Stone, J., "On the Vocation of the International Law Commission", 57 Columbia L.R. (1957), 16.
- Tabata, S., "Interim Report by the Committee on State Succession", The Japanese Ann. of International Law, No. 9 (1965), 167.
- \_\_\_\_\_, "The Independence of Singapore and Her Succession to the Agreement Between Japan and Malaysia for Air Services", The Japanese Ann of International Law, No. 12 (1968), 36.
- Thomas, A.J., "Non-Intervention in Public Order in the Americas", Proceedings, A.S.I.L. (1959), 72.
- Thierry, H., "La cession a la Tunisie des terres des agricultures francais", 9 Annuaire francais (1963), 933.
- Toma, P.A., "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic", 50 A.J.I.L. (1956), 611.
- Tunkin, G., "Co-existence and International Law", 95 Hague Recueil (1958), 1.
- \_\_\_\_\_, in I.L.C. Yearbook, 1, (1963), 69.
- Udina, M., "La succession des Etats quant aux obligations internationales autres que les dettes publiques", 44 Hague Recueil (1933).
- Vallat, F.A., "Some Aspects of the Law of State Succession", 41 Trans. Grotius Soc. (1956), 123.
- Verbit, G.P., "State Succession in the New Nations", Proceedings, A.S.I.L. (1966), 119.
- Wade, E.E.S., "Act of State in English Law: Its Relation with International Law", 15 B.Y.I.L. (1934), 98.
- Weinschel, H., "Doctrine of Equality of States and Its Recent Modifications", 45 A.J.I.L. (1951), 417.
- Wilk, K., "International Law and Global Ideological Conflicts: Reflections on the Universality of Int. Law", 45 A.J.I.L. (1954), 648.
- Wolf, F., "Conventions internationales du travail et le succession d'Etats", Annuaire francais (1961), 742.



Wright, Q., "Conflicts between International Law and Treaties", 11 A.J.I.L. (1917), p. 566.

\_\_\_\_\_, "The Goa Incident", 56 A.J.I.L. (1962), 617.

\_\_\_\_\_, "The Influence of the New Nations of Asia and Africa Upon International Law", 13 Foreign Affairs Report (1958), 38.

\_\_\_\_\_, "Asian Experiences and International Law", 1 International Studies (1959), 71.

Young, R., "The State of Syria: Old or New?" 56 A.J.I.L. (1962), 482.

Zemanek, K., "State Succession after Decolonisation", 116 Hague Recueil (1965), 187.

#### OTHERS

American Law Institute, Restatement of the Foreign Relations Law of the United States (1965).

I.L.A. Reports, 1958, 1960, 1962.

I.L.A., The Effect of Independence on Treaties, London (1965).

Imperial Conference, 1926, Summary of Proceedings: Report of Inter-Imperial Relations Committee (1926).

Imperial Conference, 1937; Ollivier, Colonial and Imperial Conferences, Vol. 3, Part II.

Industrial Property Quarterly, April, 1960, July, 1960, May, 1962.

Industrial Property Monthly Review, January, 1961.

10 Commonwealth Survey (1964).

New York Times, May 29, 1956.

\_\_\_\_\_, June 12, 1956.

\_\_\_\_\_, October 1, 1961.

The Times, London, February 22, 1963.

\_\_\_\_\_, May 2 and 4, 1963.



\_\_\_\_\_, June 15, 1963.

\_\_\_\_\_, July 5, 1963.

\_\_\_\_\_, October 31, 1963.

\_\_\_\_\_, March 4 and 5, 1964.

West Africa, March 7, 1964, No. 2440.























**B29948**